ALB-2003-3-004 19-11-2003 31 Constitutionality of referenda

a) Albania / **b)** Constitutional Court / **c)** / **d)** 19-11-2003 / **e)** 31 / **f)** Constitutionality of referenda / **g)** *Fletore Zyrtare* (Official Gazette), 94/03, 4160 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

1.3.4.6.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Admissibility of referenda and other consultations - Referenda on the repeal of legislation.
3.1 **General Principles** - Sovereignty.
3.3.1 **General Principles** - Democracy - Representative democracy.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
4.5.2 **Institutions** - Legislative bodies - Powers.
4.9.2 **Institutions** - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy.
4.10.2 **Institutions** - Public finances - Budget.

Keywords of the alphabetical index:

Pension, insurance scheme / Law, abrogation, partial, consequences / Referendum, initiative, requirements.

Headnotes:

The Constitution allows for the exercise of the sovereignty of the people by referendum as long as that exercise is not contrary to the legislative process. A referendum does not constitute an alternative to the legislative process of the Assembly. It is an instrument for the integration and stimulation of the legislative process of the Assembly, where in a particular case there is a risk that the principle of compliance of the will of the parliamentary majority with that of the majority of the people may not be respected.

Regulating the system of social security falls under the exclusive competence of the lawmaker, which has to pay special attention to the limits laid down by the Constitution and the duty to respect the fundamental rights of citizens. The Court particularly referred to the constitutional restriction on holding a general referendum on the abrogation of part of a law in cases where the remaining part of that law is incapable of standing independently of the part abrogated.

In such cases, the abrogation of part of the law would create a legal vacuum putting the lawmaker under the obligation to fill that legal vacuum (even against its will). If this situation were to become very frequent, it would infringe the very principle of parliamentary democracy. The restriction in question aims at protecting the **rule of law** and the principle of legal security because requiring the law to remain applicable even after the abrogation of some of its parts serves the purpose of legal security.

Summary:

53,000 electors submitted a request to the Constitutional Court. The request concerned the constitutionality of a referendum on the abrogation of some provisions of the law on social security increasing the age for obtaining an old-age pension (for men from 60 to 65 years of age and for women from 55 to 60 years of age). As to the constitutionality of the request, the Constitutional Court found that it was necessary to clarify three main issues.

1. The first issue concerned whether it was legitimate for the appellants to hold a general referendum. In that respect, the Constitutional Court used the principles of representative democracy as a basis. It pointed out that referenda are connected with the principle of the sovereignty of the people (Article 2.1 of the

Constitution), which is exercised either directly or indirectly through its representatives. Instruments of direct democracy are not considered as amounting to a power competing with that of the representative bodies, but as instruments used to avoid the representatives' lack of action or to balance that lack of action. The Constitution allows for the exercise of the sovereignty of the people by referendum, as long as that exercise is not contrary to the legislative process. The Court held that a general abrogative referendum could be initiated only by the signatures of at least 50,000 of citizens eligible to vote, whereas a referendum on the proposal and the adoption of a draft-law could be held only upon the consent of the Assembly of Albania. The reason for that restriction is to avoid a situation where referenda become a frequent phenomenon, since they would then compete with the parliamentary legislative process of the Assembly. Such a situation would not be in conformity with the above-mentioned fundamental constitutional principle. Therefore, the Constitution and Electoral Code have set out criteria for holding referenda, such as: a minimum number of initiators (50,000 of electors), exclusion of some categories of issues, etc.

2. The Constitutional Court also examined whether the law on which the referendum was to be held fell into the category of laws that were not allowed to be included in a referendum by the Constitution. Article 151.2 of the Constitution sets out that a referendum cannot be held on issues regarding the state budget, taxes and financial obligations. Although it appeared that the law in question did not fall into one of those specific categories, that law and its effects were directly related to the state budget. The social security system is an "open" system subject to changes and improvements due to the variable social and economic conditions. That system functions on the basis of employer-employee contributions in favor of beneficiaries. Any changes to the relation of contributors-beneficiaries have an effect on the state budget, because in cases where the contributions to the social security fund fall under the amount necessary to cover the beneficiaries, the difference is covered by the state budget. It is the state that regulates the relationship between these categories and guarantees the social security fund in the event of bankruptcy. In the case in question, increasing the age for obtaining an old-age pension would bring about the gradual increase in the number of contributors and decrease in the number of beneficiaries, which would lead to improvements in the social security system for future generations of pensioners.

3. The third issue concerned the constitutional restriction on holding a referendum on the abrogation of some parts of a law in cases where the remaining part of that law is incapable of standing independently of the part abrogated and would therefore not be applicable (Article 126.3 of Electoral Code). According to the Constitutional Court, that restriction conformed to the constitutional principle of representative democracy. The appellants limited their request to only the abrogation of provisions related to the age increase. But, the abrogation of those provisions would affect the part of the law concerning the calculation of the number of years worked and the amount to be allowed by social security too. That part could not be self-executing in the event of the abrogation of the above-mentioned provisions.

For those reasons, the Constitutional Court considered that the request for holding a general referendum on the abrogation of the provisions in question was not in conformity with the Constitution.

Languages:

Albanian.

ARM-2004-1-003 30-03-2004 DCC-483 On the conformity with the Constitution of the obligations set out in the Criminal Law Convention on Corruption (with attached declarations)

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 30-03-2004 / **e)** DCC-483 / **f)** On the conformity with the Constitution of the obligations set out in the Criminal Law Convention on Corruption (with attached declarations) / **g)** *Tegekagir* (Official Gazette), 3/2004 / **h)** ..

Keywords of the Systematic Thesaurus:

4.16 **Institutions** - International relations.

Keywords of the alphabetical index:

Corruption, criminal law / Treaty, constitutional requirement.

Headnotes:

The Criminal Law Convention on Corruption will promote the strengthening of democracy and **rule of law** in the Republic of Armenia, two principles enshrined in Article 1 of the Constitution, as well as the protection of human rights.

Summary:

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the conformity with the Constitution of the obligations set out in the Criminal Law Convention on Corruption (with attached declarations).

The Constitutional Court stated that the Republic of Armenia assumed under the Convention an obligation to take legislative and other measures in order to criminalise:

- the active and passive bribery of domestic public officials and participation in these offences;

- the active and passive bribery, when involving members of domestic and foreign public assemblies, foreign public officials, officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts;

- the active and passive bribery in the private sector; and

- offences connected with money laundering, which are set out by the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

The Republic of Armenia is also obliged to take appropriate measures in order to provide for criminal or other responsibility for account offences, described in Article 14 of the Convention, as well as for legal persons who are responsible for active bribery, trading in influence and money laundering offences.

The Republic of Armenia has to take appropriate measures in order to establish its jurisdiction over the offences set out in the Convention, when such offences are committed in the territory of the Republic of Armenia or by a citizen, domestic official or member of the domestic assembly of the Republic of Armenia.

The Republic of Armenia, in accordance with Article 29 of the Convention, declares that the domestic bodies that are responsible for the cooperation provided for by the Convention are:

- the Office of the Prosecutor General as regards cases that are at the pre-trial stage of proceedings; and

- the Ministry of Justice as regards cases that are at the trial stage of proceedings.

The Court found that the obligations set out in the Convention were in conformity with the Constitution.

Languages:

Armenian.

AUT-2004-2-002 30-06-2004 G 27/04 et al.

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30-06-2004 / **e)** G 27/04 et al. / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.13 **General Principles** - Legality.
4.6.9 **Institutions** - Executive bodies - The civil service.

Keywords of the alphabetical index:

Civil servant, retirement, early / Civil servant, retirement, involuntary / Law, degree of determination / Administrative authority, conduct / Administrative authority, discretionary power.

Headnotes:

The **rule of law** embodied in Article 18 of the Constitution requires that the contents of laws must determine the conduct of the authorities. As a result of Article 130.2 of the Constitution, the ordinary legislator may refrain from adopting a statute that binds the administrative authorities' conduct, thereby giving them discretionary power. However, in such cases the legislator must establish relevant criteria for the use of discretion within the meaning of the law.

A statute empowering the administrative authority to send civil servants - after having reached the minimum age and sufficient years of service - *ex officio* into early retirement "where no important reasons of the service speak against it" establishes only a limit but not a relevant criterion. In such cases, it is for the authority to choose, which contradicts the **rule of law**.

Summary:

Several civil servants who were forced into early retirement on the basis of the above-mentioned statute (§ 15a Law on the Civil Service; *Dienstrechts-Novelle* 2001) filed complaints in both the Constitutional Court as well as the Administrative Court. Upon applications of the latter and *ex officio,* the Constitutional Court reviewed the statute.

The government argued that the public service was bound to the economical and cost-effective use of personnel. Measures of reorganisation, task-simplification or reduction, out-sourcing and other measures with similar effects had resulted in a surplus of irremovable civil servants to whom the legislator had granted in 1997 the possibility of (voluntary) early retirement. In 2001 the legislator had simply amended that possibility to include all civil servants having reached 61 and a half years of age. Although the authorities could arbitrarily apply that statute, abstractly possible conduct could not make a constitutional law unconstitutional.

The Court noted that that reasoning merely explained why the impugned statute had been adopted, but it did not at all show that the statute determined the conduct of the authorities to a sufficient degree so as to bring the statute into conformity with the rule of law. The statute was struck down, with no time-limit set for the entry into force of the judgment.

Supplementary information:

In connection with extensive reorganisation measures of some ministries, several high-ranking officers of the constabulary and the military were - among others - sent into early retirement. Those compulsory retirements provoked a certain political interest as well as the interest of the media in this case.

Languages:

German.

AUT-2003-3-003 08-10-2003 G 119, 120/03

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08-10-2003 / **e)** G 119, 120/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.19 **General Principles** - Margin of appreciation.
5.3.33 **Fundamental Rights** - Civil and political rights - Right to family life.

Keywords of the alphabetical index:

Immigration, quota system / Family reunion, right / Settlement, permit / Residence, permit.

Headnotes:

The legislator is in general free to establish a quota system for also immigrants entering the country for the purpose of family reunion or formation. The legislator must however not entirely ignore Article 8 ECHR when defining the requirements for immigration.

A statute authorising the issuing of a regulation on quotas that strictly apply to even those (rare) cases of foreigners who have a right to family reunion is contrary to Article 8 ECHR.

The **rule of law** requires that a statute that regulates the conditions for granting settlement permits within the quota system must be sufficiently clear. A statute that neither clearly defines how the quota is to be distributed among applications, nor sets out a transparent ranking system for applications on the waiting list violates the **rule of law**.

Summary:

Two Turkish citizens, applied for a first settlement permit *(Erstniederlassungsbewilligung)* for the purpose of family formation with their husbands who have both lived in Austria since 1997 on the basis of unlimited permits to stay. Both received a letter stating that the maximum number of permits under the obligatory quota had already been reached for 2001 and 2002 and that their applications would therefore not be dealt with at the time but rather the decisions on them postponed. After six months, both women applied to the higher authority to take jurisdiction over and decide the matters. Those applications were rejected on the ground that the waiting time resulting from the "closed quota" suspended the running of the (lower) authority's time-limit for decision. Both women lodged complaints with the Court alleging the unconstitutionality of the relevant statutes of the Alien Act (§ 18.1.3 and § 22; *Fremdengesetz*).

The Court shared the complainants' doubts and started an *ex officio* review of the statutes applied.

In accordance with the established case-law of the European Court of Human Rights as well as with its own case-law, the Court stated that Article 8 ECHR did not impose on a state a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see the *Abdulaziz*, *Cabales and Balkandali* Judgment of 28 May 1985, the *Gül* Judgment of 19 February 1996, and the *Ahmut* Judgment of 28 November 1996).

Referring to the *Sen* Judgment of 21 December 2001, Appl. no. 31465/96, the Court pointed out that there

were cases in which a refusal to grant a residence or settlement permit violated Article 8 ECHR. The legislator has a broad margin of appreciation when laying down the requirements for immigration, but is nevertheless bound to consider respect for family life.

The Court noted that aliens having a right to family reunion could not be regarded as being a few exceptional cases. On the contrary, it is the general case that first one family member enters the country, and after settling down, wishes to reunite with his close relatives. Due to the perennial waiting-time caused by the quota system, wives who have applied for a permit - but still live abroad - give birth to children. Because such cases are also subject to the quota system, the Court declared that the impugned statute (§ 18.1.3 Alien Act, which had been amended in the meantime) was not in compliance with Article 8 ECHR.

Moreover, the Court ruled that the statute regulating the administration of the quota system (§ 22 Alien Act) was so poorly drafted that it clearly did not meet the requirements of the rule of law. For that reason, it was also declared unconstitutional.

Supplementary information:

According to the law as amended, in cases where persons have a right to family reunion, settlement permits are granted on humanitarian grounds outside the quota system.

Languages:

German.

AUT-2003-1-001 13-03-2003 G 368-371/02 V 81-84/02

a) Austria / **b)** Constitutional Court / **c)** / **d)** 13-03-2003 / **e)** G 368-371/02, V 81-84/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.2.4 **Constitutional Justice** - Types of claim - Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.1.1 **Constitutional Justice** - Jurisdiction - Scope of review - Extension.
1.3.5.7 **Constitutional Justice** - Jurisdiction - The subject of review - Quasi-legislative regulations.
1.5.4.4.1 **Constitutional Justice** - Decisions - Types - Annulment - Consequential annulment.
2.3.6 **Sources of Constitutional Law** - Techniques of review - Historical interpretation.
3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.13 **General Principles** - Legality.
3.15 **General Principles** - Publication of laws.
4.6.3.2 **Institutions** - Executive bodies - Application of laws - Delegated rule-making powers.

Keywords of the alphabetical index:

Publication, complete, rule / Regulation, retroactive effect / Law, wording, change of text / Law, rectification, *errata* / Law, republication / Government, law-making process, participation.

Headnotes:

The rectification of *errata* in the wording of a federal law published by the Federal Chancellor in the Federal Law Gazette is to be classified as a regulation within the meaning of Article 139.1 of the Constitution. It has retroactive effect as from the day of publication of the statute that has been rectified.

Aside from clerical or other obvious errors, any difference between the published text (which is alone decisive for the legal binding force) and the text of the law as adopted by Parliament may be considered as *errata* in so far as the intended contents of the law are not changed. The rectification of the previously published incorrect wording of a law going beyond this understanding of *errata* by also changing the contents of a statute breaches the constitutional rule of the complete publication of a law (Article 49.1 of the Constitution).

An ordinary law that also authorizes the rectification of errors in a statute's contents lacks a constitutional basis. A statute extending the rights of the executive (the Federal Chancellor) to participate in the law-making process as granted by the Constitution violates the principle of separation of powers.

Moreover, such a statute also contradicts the **rule of law** as a citizen can no longer rely on published laws and thus act accordingly.

Summary:

Due to several complaints by patients who had to go to an outpatient department for therapy and were therefore charged a fee *(Ambulanzgebühr)*, on 29 June 2002 the Court decided to initiate an *ex officio* review of § 135.a of the General Social Security Act *(Allgemeines Sozialversicherungsgesetz*; *ASVG)*.

On 6 August 2002 the Federal Chancellor published a rectification of *errata*, thus correcting § 135.a.3 *ASVG* in a such way that the whole second sentence was republished. Actually an essential part of this second sentence, which had been adopted as such by Parliament, authenticated by the Federal President and countersigned by the Federal Chancellor, had not been previously published and was inserted into the text of the law.

That caused the Court to initiate another two *ex officio* reviews (11 October 2002): the first on the constitutionality of § 2.a.2 of the Law on the Federal Law Gazette *(Bundesgesetzblattgesetz*; *BGBlG)* and the second on the legality of the rectification of *errata* in question.

While § 2.a.1 *BGBlG* authorized the Federal Chancellor to rectify *errata*, sub-paragraph 2 set out a definition according to which every deviation of the published wording of a law from the original text (as adopted in Parliament) and regardless of a change in a norm's contents is to be seen as *"errata"*.

After a thorough historical analysis of the legislation on the publication of laws and the possibilities of correcting errors as well as an analysis of its established case-law on these legal questions, the Court annulled the norms under review for the above mentioned reasons.

Moreover, the Court held that pursuant to Article 24 of the Constitution, legislation is the "main function" of the National and the Federal Council (Parliament). Some organs of the executive, such as the Federal President, the Chancellor and the Government, may participate in the legal process, but only as far as they are authorized to do so by the Constitution. It is therefore not for the ordinary legislator to develop or extend that participation at will.

A rectification of *errata*, which is a regulation with a retroactive effect, that is capable of also changing a law's contents would result in an inexplicable contradiction of the republication of a law as laid down in the Constitution itself (Article 49.a of the Constitution): the Federal Chancellor is empowered to republish a law and on this occasion to rectify only obsolete terminology and to adjust outdated spelling or other minor discrepancies, while the binding effect of a republication is *ex nunc (sic!)*.

Apart from the violation of both the principle of the separation of powers and that of the rule of law the Court found that the retroactivity of a law is a prerogative of the legislator. These powers must not be transferred to an organ of the executive by the ordinary legislator without an explicit constitutional basis.

Not only did the Court annul § 2.a.2 *BGBlG* and parts of the Federal Chancellor's rectifying regulation, it also consequently declared § 135.a *ASVG* to be unconstitutional (Judgment of the same day, G 218/02 *et al.*).

Languages:

German.

AUT-2002-3-005 12-12-2002 G 151, 152/02

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12-12-2002 / **e)** G 151, 152/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.2.2.1 **Constitutional Justice** - Types of claim - Claim by a private body or individual - Natural person.
1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.17 **General Principles** - Weighing of interests.
4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
4.7.1.1 **Institutions** - Judicial bodies - Jurisdiction - Exclusive jurisdiction.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Extradition, powers / Extradition, granting authority / Receiving state, guarantees / Remedy, effective.

Headnotes:

Under § 33 of the Extradition and Legal Assistance Act *(Auslieferungs- und Rechtshilfegesetz*; "the Act") it is exclusively for the Court of Appeal to decide whether a request for extradition is permissible, taking into account all aspects of the rights granted by the Act as well as all rights guaranteed by the Constitution, including the rights guaranteed by the European Convention on Human Rights.

The final decision on a request for extradition lies with the Minister of Justice, but only if the Court of Appeal has first found that the extradition is permissible. The Minister has to weigh other interests such as, in particular, aspects of international law. As his or her decision might interfere with a person's individual rights the Minister has to issue a formal decree *(Bescheid)*, against which the person concerned is entitled to lodge a complaint with the Administrative and/or the Constitutional Court.

The exclusion of appeals against the decision of the Court of Appeal as laid down in § 33.5 of the Act is unconstitutional. It contradicts the principle of the **rule of law** as well as the right to an effective remedy under Article 13 ECHR.

Summary:

A citizen of the United States (as well as of Israel) was convicted of fraud and sentenced to 845 years'

imprisonment in the USA. He fled to Austria before the judgment was pronounced. He was arrested in October 2000 and the US Embassy requested his extradition in December 2000.

The Vienna Court of Appeal *(Oberlandesgericht Wien)* refused to grant the request for extradition because the requesting state had not guaranteed that the person concerned could have his conviction reviewed by a higher court. For this reason, extradition would contravene Article 2 Protocol 7 ECHR.

Upon appeal by the Prosecutor General *(Generalprokurator)* on the basis of a plea of nullity for the preservation of law *(Nichtigkeitsbeschwerde zur Wahrung des Gesetzes)*, the Supreme Court quashed the decision on 9 April 2002. The Supreme Court found that the legal question of the guarantee of access to appeal proceedings in criminal cases (Article 2 Protocol 7 ECHR) was not to be answered by the Court of Appeal but by the Minister of Justice. Considering the principle of the separation of powers (Article 94 of the Constitution) and §§ 33 and 34 of the Act, the Court of Appeal and the Minister of Justice share jurisdiction on the granting of a request for extradition. The Supreme Court returned the case to the Vienna Court of Appeal.

On 26 April 2002 the Constitutional Court received an (individual) application of the person, whose extradition proceedings were again pending. The applicant alleged that his rights were directly violated by the unconstitutionality of certain provisions of the Act, including the provision stipulating that no appeal lies against the decisions of the Court of Appeal in the relevant matters (§ 33.5 of the Act). He further argued that the term for his custody *(Haftfrist)* was about to expire. The Court of Appeal would therefore have to decide quickly on his extradition and this time, owing to the above-mentioned Supreme Court decision, could not find in favour of him. The Court of Appeal, deciding this matter as court of first and last instance, was not entitled to request a constitutional review of the provisions applied (Article 140 of the Constitution), while the Minister of Justice was not at all entitled to do so. Moreover the Minister's final decision would not even be qualified as a decree against which one could lodge a complaint with the Administrative and/or the Constitutional Court. The Minister's decision would simply be qualified as an order.

With respect to the admissibility of this application, the Court found that § 33.5 of the Act, which excluded appeals in cases such as the present one, had already directly forestalled the applicant since the Supreme Court's quashing of the Vienna Court of Appeal's earlier decision. Furthermore, the Vienna Court of Appeal had in the meantime allowed the extradition of the applicant on 8 May 2002. The Court accepted the applicant's argument that there was no other possibility to have the relevant provision reviewed. The applicant could not be expected to appeal against his extradition, precisely because this avenue was barred by the law, nor could he be expected to lodge an appeal for the protection of fundamental rights *(Grundrechtsbeschwerde)* as this recourse was barred by the Supreme Court's relevant precedents. Therefore his (individual) application to the Constitutional Court was admissible.

Pursuant to Article 94 of the Constitution, the judicial and executive branches of power "shall be separate at all levels of proceedings". Considering all aspects of this (organisational) principle of the separation of powers the Court found - unlike the Supreme Court - that §§ 33 and 34 of the Act do not provide for shared jurisdiction. Accordingly the jurisdiction to decide whether to grant extradition is exclusively assigned to the Court of Appeal (§ 33 of the Act), which must consider all aspects of rights granted by the Act and by the Constitution. Therefore, where the Court of Appeal gives reasons based on rights guaranteed by Article 2 Protocol 7 ECHR, it is not exceeding its jurisdiction but may only be wrong as to its decision on the merits. The Minister can only decide on the basis of a decision by the Court of Appeal granting a request for extradition. He or she considers above all questions of international law or the political aspects of the extradition (§ 34 of the Act). As the Minister must use his or her discretionary power lawfully, his or her decision is consequently subject to review by the Administrative and/or the Constitutional Court.

Finally the Court ruled that the exclusion of appeals (§ 33.5 of the Act) contradicted the principle of the rule of law. The Court recalled that it is the essence of the rule of law that all actions of state organs must have a statutory and at least indirectly a constitutional basis (Article 18 of the Constitution) and that a system of judicial review must guarantee that each action is consistent with the law and the Constitution. Furthermore the rule of law requires that such a system of review grants a certain degree of efficiency.

Taking into account the case-law of the European Court of Human Rights on Articles 3 and 6 ECHR, granting

extradition may give rise to issues of interference with and encroachment on certain constitutionally guaranteed rights. With regard to the right to an effective remedy (Article 13 ECHR) the decision to extradite a person must be subject to appeal. It is, however, also required by the principle of the rule of law that such a decision must be subject to appeal. The Court annulled § 33.5 of the Act insofar as it denied this right.

Languages:

German.

AUT-2001-3-005

11-10-2001 G 12/00 *et al*

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11-10-2001 / **e)** G 12/00 *et al* / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.3 **Constitutional Justice** - Jurisdiction - The subject of review - Constitution.
3.3 **General Principles** - Democracy.
3.9 **General Principles** - Rule of law.
4.5.2 **Institutions** - Legislative bodies - Powers.

Keywords of the alphabetical index:

Constitutional law, ordinary / Constitution, suspension.

Headnotes:

Paragraph 126a of the Federal Procurement Law *(Bundesvergabegesetz* - hereinafter *BVergG)* having the rank of a constitutional provision according to which statutes of the *Länder* on the organisation and jurisdiction of organs established to review the awards of public contracts should be supposed not to be unconstitutional, but contradicts the Constitution through violation of two of its basic principles, the **rule of law** and democracy.

The loss of the Constitution's normative power and standard setting function for a part of the legal order violates the **rule of law**.

It furthermore contradicts the basic principle of democracy if the ordinary constitutional legislator was supposed to be authorised to suspend the Constitution in its effects if only for a part of the legal order.

Summary:

The facts and legal background of the case were already published in the précis on the *ex officio* review, G 12/00 *et al.*, *Bulletin* 2001/1 [AUT-2001-1-003].

In its final judgment, the Court came to the conclusion that not only the wording of the reviewed constitutional provision but also its systematic context, its historically provable purpose as well as the historical context of its creation, show abundantly clear that this provision should have made all legislation of the *Länder* on the organisation and jurisdiction of institutions in the field of public procurement control exempt from the (Federal) Constitution. Thus the Constitution should be deprived of its normative power for this part of the legal order.

Such a dismantling of the Constitution's standard-setting function violates the rule of law, the quintessence of which is that "all acts of state organs must be based on law and above all on the Constitution".

The Court expressly did not answer the question whether the Constitution could be suspended by holding an obligatory referendum as stipulated for the Constitution's total revision (Article 44.3 of the Constitution) or if

the Constitution may not be suspended at all.

Supplementary information:

For the first time in the history of Austrian constitutional jurisdiction, the Court annulled ordinary constitutional law.

Languages:

German.

AUT-2001-1-003 10-03-2001 G 12/00, G 48-51/00

a) Austria / **b)** Constitutional Court / **c)** / **d)** 10-03-2001 / **e)** G 12/00, G 48-51/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.4.10.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of the constitutionality of enactments - Limits of the legislative competence.
1.3.4.11 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of constitutional revision.
1.3.5.3 **Constitutional Justice** - Jurisdiction - The subject of review - Constitution.
2.1.1.1.1 **Sources of Constitutional Law** - Categories - Written rules - National rules - Constitution.
2.1.3.1 **Sources of Constitutional Law** - Categories - Case-law - Domestic case-law.
3.9 **General Principles** - Rule of law.

Keywords of the alphabetical index:

Administration, supreme organs / Body, independent, collegiate, with judicial character / Constitutional law, ordinary / Constitution, nucleus / Constitution, self-elimination / Constitution, suspension / Constitution, total revision.

Headnotes:

A constitutional provision, § 126a of the Federal Procurement Law *(Bundesvergabegesetz* - hereinafter *BVergG)* stipulating that all statutes of the *Länder* in force on 1 January 2001 and concerning the organisation and jurisdiction of organs established to review the awards of public contracts are to be considered as not contrary to Federal constitutional law, might be contrary to the Constitution and its principles governed by the **rule of law**.

The ordinary constitutional legislator might not have the power to suspend certain parts of the legal order, parts which are neither to be regarded as few in quantity nor as negligible in their economic importance, by an ordinary constitutional provision.

Constitutional provisions suspending the Constitution, so far they may be enacted at all, are presumably subject to a referendum as required by Article 44.3 of the Constitution.

Summary:

There were several cases pending in which the Court had entered partly *ex officio* partly on the application of the Administrative Court the review of a statute of the Public Procurement Law of the *Land Salzburg*

(Landesvergabegesetz). In the Constitutional Court's (preliminary) legal opinion it might have been unconstitutional that the Public Procurement Review Senate *(Salzburger Vergabekontrollsenat)* being installed as an independent collegiate body with judicial character *(Kollegialbehörde mit richterlichem Einschlag)* should also have jurisdiction to review decisions taken by the supreme organs of the *Land* administration. Thus, the incriminated independent collegiate body would be unconstitutionally set over the supreme organs of administration. A legal opinion which was already settled by previous judgments of the Court (e.g. Telekom-Control Commission, see *Bulletin* 1999/1 [AUT-1999-1-002]; Private Broadcasting Board, see *Bulletin* 2000/2 [AUT-2000-2-005]; Federal Procurement Office, Judgment of 30 September 1999, G 44-46/99).

In the meantime the legislator enacted the (above quoted) provision § 126a *BVergG* in the rank of ordinary constitutional law.

The Court decided to stay the review proceedings concerning the *Land* statute and to start (again *ex officio)* the review of this relevant constitutional provision. It held that it was the evident intention of the constitutional legislator to restore the constitutionality of the *Land* statute under review and to exempt similar ones of the Court's review. The other intention was quite obviously to exclude the application of the Federal Constitution for some parts of the legislation of the *Länder*. This exclusion seems to include not only all Federal constitutional provisions concerning the state organisation but also the principles governing the rule of law as well as fundamental rights (especially the right to a hearing before a lawful judge, a decision by an independent and impartial tribunal and the principle of equality) and even Article 44.3 of the Constitution containing the procedure to be followed for a total revision of the Constitution (obligatory referendum).

Furthermore the Court held that it is fundamental to the Constitution not to authorise self-elimination. A suspension of that kind might therefore well be contrary to the rule of law according to which "all state organs must be based on law and after all on the Constitution" and "effective review proceedings must exist for the protection of this requirement". These principles seem to be a decisive element of the rule of law and their nucleus might not be at the disposal of the ordinary constitutional legislator.

Supplementary information:

This is the first time that the Court has reviewed ordinary constitutional law. The final decision is expected in autumn (press release of the Court of 19 March 2001).

Cross-references:

- Decision of 11.03.1999 (B 1625/98); see *Bulletin* 1999/1 [AUT-1999-1-002];
- Decision of 29.06.2000 (G 175-266/99); see *Bulletin* 2000/2 [AUT-2000-2-005];
- Decision of 30.09.1999 (G 44-46/99).

Languages:

German.

AUT-1998-3-009 16-12-1998 B 1172/98

a) Austria / **b)** Constitutional Court / **c)** / **d)** 16-12-1998 / **e)** B 1172/98 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.13 **Constitutional Justice** - Jurisdiction - The subject of review - Administrative acts.
3.9 **General Principles** - Rule of law.
3.22 **General Principles** - Prohibition of arbitrariness.

4.13 **Institutions** - Independent administrative authorities.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.

Keywords of the alphabetical index:

Decree, validity / Minimum standard, rule of law.

Headnotes:

An administrative decree establishing the dominant position of undertakings which is based on proceedings initiated and conducted solely by the registration office of the competent authority and on the report of the evidence taken as well as the draft decree delivered by the registration office of the authority in question fails to meet the minimum standards of the **rule of law**.

Summary:

The Telecom-Control company, of which the shares are held by the Federation, was established by the Telecommunications Act 1997 (TKG) in order to safeguard market regulation insofar as such matters are not within the jurisdiction of the Telecom-Control Commission. The Commission's tasks are stipulated in Article 111 TKG and comprise granting of licences, establishing the dominant position of undertakings and defining the conditions of network interconnection. The Telecom-Control Commission is an independent administrative authority equivalent to a tribunal composed of three members and of which the chairman is a judge. The decisions of the Telecom-Control Commission are not subject to appeal but can be brought before the Constitutional Court. It is Telecom-Control which conducts the management of the Commission, acting as a kind of registration office. In this connection, the staff of Telecom- Control is subject to the instructions of the Commission's chairman or of one of its other members.

A stock company lodged a complaint against a decree of the Telecom-Control Commission, questioning the validity of a decree affecting it and claimed that the decree establishing the complainant's dominant position in the mobile telephone market and in the provision of network interconnection service violated the complainant’s right to be heard by a court as the decree affected «civil rights and obligations» within the meaning of Article 6.1 ECHR. Beyond that, the complaint alleged that an unconstitutional provision had been applied (Article 33 TKG).

As to Article 6.1 ECHR the Court clarified that the complainant, who had not even asked for a hearing during the proceedings, had thus waived this right. With regard to the facts, the Court noted that the Telecom-Control Commission had neither initiated the proceedings nor at any stage of the proceedings asked questions, taken evidence or determined the objective and the purpose of the proceedings. On the contrary, it was the registration office (Telecom-Control) which conducted the proceedings, collected data and took evidence. The Commission simply took note of the report on the evidence. Without further discussion the Commission had signed the decree drafted by Telecom-Control. Contrary to the complainant's view, the Court found there was no doubt that the authentic copy - certified by the manager of Telecom-Control, and of which the original was signed by the chairman of the Commission - was a valid decree.

Regarding the significance of the Telecom-Control Commission's jurisdiction for which the legislator had established the Commission as an independent authority (tribunal) and regarding the importance of the questions raised in the proceedings, the Court stated that the Commission's method of conducting its proceedings amounted to arbitrariness. The Court overruled the decree insofar as it concerned the complainant.

Languages:

German.

AUT-1998-2-005 24-06-1998 G 31/98, G 79/98, G 82/98, G 108/98

a) Austria / **b)** Constitutional Court / **c)** / **d)** 24-06-1998 / **e)** G 31/98, G 79/98, G 82/98, G 108/98 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
5.1.1.3.1 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners - Refugees and applicants for refugee status.
5.3.11 **Fundamental Rights** - Civil and political rights - Right of asylum.
5.3.13.26 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Time-limit for appeal, reduction / Effective remedy.

Headnotes:

A statute which gave refugees whose requests for asylum were rejected on the grounds of their entering the country through a secure third country only two days to lodge an appeal does not meet the requirements of the **rule of law**.

Summary:

The Autonomous Federal Refugee Authority (*Unabhängiger Bundesasylsenat*) had filed several applications to overrule a specific part of Article 32.1 of the Asylum Act 1997 (*Asylgesetz* 1997) alleging that it was unconstitutional for two reasons:

1. Under Article 63.5 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz* 1991) an appellant is given two weeks to lodge an appeal. The federal legislator, who is empowered by Article 11.2 of the Constitution to vary the general rules of administrative procedure if required by the matter to be regulated, did not act in accordance with this authorisation when shortening the time for appealing in the Right to Asylum Act 1997.

2. The cutting down to two days of the period for filing an appeal in the complex matter of requests for asylum is contrary to the rule of law. According to the Court's case-law on the rule of law any means of legal redress must grant a minimum of effectiveness to the appellant. This guarantee was contradicted by the impugned statute.

Following essentially the reasoning of the applications, the Court annulled the relevant parts of the challenged law. Beyond that, the Court specified that the time for appealing may be shortened by the (federal) legislator as long as the appellant has enough time to contact professional consultants in order to be able to understand the substantive and procedural background of the rejecting decision and to be able to lodge a sufficiently founded appeal against it. The Court added that a period of a week for filing an appeal would meet the requirements of the rule of law granting a minimum of *de facto* efficiency to refugees.

Supplementary information:

The annulment and the Court's additional remark led to an immediate attempt of some members of parliament to amend the annulled provision by cutting the time-limit in question down to one week. However, this initiative did not pass Parliament. Due to the Court's judgment and the fact that the legislator has not enacted another Statute, refugees like almost any other appellants have two weeks to lodge an appeal.

Legal norms referred to:

Articles 11.2 and 140 of the Constitution.

Languages:

German.

BLR-2002-B-004 27-09-2002 J-146/02

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 27-09-2002 / **e)** J-146/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)**

CODICES (Russian, English)..

Keywords of the Systematic Thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
3.20 **General Principles** - Reasonableness.
5.3.6 **Fundamental Rights** - Civil and political rights - Freedom of movement.
5.3.10 **Fundamental Rights** - Civil and political rights - Rights of domicile and establishment.

Keywords of the alphabetical index:

Citizen, traveling abroad, right, limitations / Passport, note, obligatory / Tax, passport, authorisation to leave the country.

Headnotes:

The right of nationals to move freely, to leave the country and to return to it without hindrance is guaranteed by Article 30 of the Constitution and Article 3 of the International Covenant on Civil and Political Rights. This means that each national is an unconditional bearer of this constitutional right. Furthermore, restrictions on the temporary departure of certain nationals abroad are possible only in strict conformity with the requirements of the Constitution and must be consistent with the principles and purposes of a democratic state governed by the **rule of law**, and must be proportionate to the values guaranteed by the Constitution, under which the supreme values of society and the State are the individual, his or her rights and freedoms, and the guarantees of their realisation (Article 2 of the Constitution).

Summary:

The case was initiated by the Constitutional Court on the basis of a constitutional motion filed by the House of Representatives of the National Assembly and concerned the verification of the constitutionality of Article 6.2 of the Law on the Procedures Governing the Departure from and Entry into the Republic of Belarus of Citizens of Belarus ("the Law") and other binding enactments, with regard in particular to the requirement that an authorisation valid for five years be inserted in the passports of citizens of Belarus leaving the country temporarily.

Having analysed the relevant provisions of the Constitution, the Law and international legal instruments, the Court concluded that the question of the collection by the state of a fee for the examination of requests for permission to leave Belarus, which was the aim of the proposal of the House of Representatives, was within the competence of the authorised bodies, i.e. the National Assembly and the Government, which were competent to resolve fairly the issues of the collection of fees on behalf of the state, the amount of such fees, the procedure for their collection and the conditions of their payment.

The Court found that the provisions in question, which provided for the insertion of an authorisation in the passport of a national of Belarus who was temporarily leaving the country, were not fully in line with the Constitution, since the insertion of such an authorisation was required for all citizens of Belarus wishing to leave the country temporarily. This infringed upon the rights of the absolute majority of nationals, who were not subject to any limitations on their right to depart.

The Court deemed that the most reasonable approach, which would allow nationals of Belarus more fully to realise the right, enshrined in Article 30 of the Constitution, to move freely and choose their place of residence within Belarus, would be to establish a procedure under which a civil passport which met the relevant international standards could be used for travel abroad without the insertion of an authorisation. For this reason the Court instructed the Council of Ministers and other state bodies competent to resolve the above-mentioned issues to take the appropriate measures.

The National Assembly was ordered to consider the improvement of the provisions of the Law. The need to revise and elaborate the list of limitations on the temporary departure of nationals from Belarus was also emphasised.

Languages:

Russian, English (translation by the Court).

BLR-2001-B-005 25-04-2001 D-115/200´

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 25-04-2001 / **e)** D-115/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / **h)** .

Keywords of the Systematic Thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
3.9 **General Principles** - Rule of law.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

Keywords of the alphabetical index:

Offence, customs, penalty / Customs, clearance, effectiveness / Confiscation, term, condition.

Headnotes:

Judicial practice that excludes the possibility of abrogating or revising judicial rulings on the termination of proceedings in cases of administrative customs offences is at variance with the requirements of the legislation on administrative offences.

The failure to apply the relevant provisions of the Administrative Code, as regards proper customs clearance of imported goods, constitutes a real threat for the economic and financial system of the country, its economic

security, public health and even the life of citizens (for example, through the importation of low quality goods), and prevents the achievement of other socially significant goals of a state governed by the **rule of law** that are enshrined in the Constitution.

One of the principles of a state governed by the **rule of law** is not only the protection of individuals by law but also fairness, which is expressed in the inevitability of liability for offences committed and in the proportionality between the punishment and the offence committed.

Summary:

The conformity with the Constitution of Article 37 of the Administrative Code ("the Code") was examined on the basis of Articles 40, 116.1 and 125 of the Constitution, Articles 7 and 11 of the Law on the Constitutional Court and Article 35 of the Law on the Prosecutor's Office, on the basis of the constitutional motion of the Prosecutor-General of Belarus.

The Prosecutor-General noted that when exercising supervision over the legality of the examination of administrative cases by the courts it is in many instances established that the requirements of the relevant legislation are violated in the handing down of rulings of the courts of law on customs offences under administrative law (i.e. administrative, rather than criminal, customs offences). Appeals by public prosecutors against those rulings often find no satisfaction. A judicial practice has been established that erroneously excludes the possibility of quashing or revising judicial rulings terminating proceedings in cases of customs offences under administrative law, contrary to the requirements of Article 37.3 of the Code.

The Court analysed various provisions of the Constitution, the Code, a resolution of the Plenum of the Supreme Court which deals with the specified issues, and a number of cases on customs offences under administrative law examined by the courts of law. The Court concluded that the practice of the courts of law with respect to the examination of such offences is inconsistent and is at variance with the Constitution and with the law due to non-observance of the requirements of Article 37.3 of the Code. Under that provision, whereas a time-limit applies for the initiation of proceedings against customs offenders, no such time-limits apply to the confiscation of goods that are direct objects of administrative customs offences or to the sealing off of specially made premises used to conceal goods to avoid clearing customs. These measures shall be taken irrespective of the time of commitment or revelation of an administrative offence. The Court found that the failure to apply Article 37.3 of the Code constituted a real threat to the economic and financial system of the country, its economic security, public health and even the life of citizens (for example, through the importation of low quality goods), and prevented the achievement of other socially significant goals of a state governed by the rule of law that are enshrined in the Constitution.

At the same time the Court indicated that the legislative approach providing, on points of fact, for open-ended liability for administrative customs offences was not in line with the general principles of legal liability, under which time-limits are usually established after which a person can no longer be held liable for an administrative offence. For the purposes of securing the rights of citizens, the legislator may thus fix a maximum time-limit within which the given issue must be resolved.

The Court found that Article 37 of the Code, in so far as it allowed for the confiscation of goods that are direct objects of administrative customs offences, and the sealing off of specially made premises used to conceal goods to avoid clearing customs, after the expiry of the time-limits fixed in Article 37.1 and 37.2 of the Code, was in compliance with the Constitution and with the laws of the Republic of Belarus.

The Court considered the application of a general three-year time-limit for the confiscation of goods or sealing off of premises to be admissible until the legislator had resolved the issue of setting time-limits for initiating proceedings for administrative liability.

The Court also pointed out that current judicial practice on the application of Article 37.3 of the Code was unconstitutional and ordered the Supreme Court to ensure uniformity of judicial practice.

Moreover, the Court ordered the National Assembly to consider the establishment of time-limits within which a

person who had committed an administrative customs offence may suffer the confiscation of goods that are direct objects of administrative customs offences or the sealing off of specially made premises used to conceal goods to avoid clearing customs.

Languages:

Russian, English (translation by the Court).

BEL-2002-3-009 15-10-2002 151/2002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15-10-2002 / **e)** 151/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 10.02.2003 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

3.2 **General Principles** - Republic/Monarchy.
3.9 **General Principles** - Rule of law.
3.24 **General Principles** - Loyalty to the State.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
5.2.2.9 **Fundamental Rights** - Equality - Criteria of distinction - Political opinions or affiliation.
5.3.19 **Fundamental Rights** - Civil and political rights - Freedom of opinion.

Keywords of the alphabetical index:

Municipality, councillor, assumption of duties, condition / Oath, political allegiance / Constitutional system, allegiance.

Headnotes:

In a state governed by the **rule of law**, the leaders are subject to the law. The oath of allegiance to the King and of obedience to the Constitution and the laws of the Belgian people must be understood as a solemn declaration of submission to the rules of the Belgian legal system. These rules make it possible to express a preference for a regime, but not to disregard the regime in force. The words "allegiance to the King" should be understood to imply recognition of the monarchy as an institution, which itself derives from the Constitution. These words have no significance other than that of a promise of allegiance to a constitutional system that a democracy has chosen.

Summary:

A municipal councillor took the statutory oath when he was appointed to the municipal council. The oath provided for by law is worded as follows: "I swear allegiance to the King and obedience to the Constitution and the laws of the Belgian people". He then instituted legal proceedings before the Brussels Court of First Instance, claiming compensation from the Belgian state for non-pecuniary damage resulting from the fact that, in order to exercise his mandate, he had had to swear allegiance to the King, which was contrary to the political opinions he held as a republican. The Court referred a preliminary question to the Court of Arbitration for a decision concerning the compatibility of Article 80 of the new Municipal Act, which lays down the wording of the oath, with the constitutional rule concerning equality (Article 10 of the Constitution). The question was a specific one: Does the obligation of municipal councillors who have other views, and more particularly those who are republicans, to take an oath of allegiance to the King undermine the principle of equality?

The Court of Arbitration again held that under the constitutional rules concerning equality and non-discrimination, categories of people in substantially different situations should not, in the absence of reasonable grounds, be treated identically.

It then pointed out that the law required that an oath be taken by those taking office and that, as a result, municipal representatives who were in favour of a republic were at a disadvantage in relation to others since they were required, if they did not want to forfeit office, to take an oath which might seem contrary to their convictions. The Court then considered whether there were objective and reasonable grounds for equal treatment of this kind.

The purpose of the oath was to hear municipal councillors declare solemnly at a public hearing that they would observe the law of the state in which they were to hold public office. Accordingly, the oath was of as much interest to those who heard it as to those who took it.

The words "allegiance to the King" should be taken to mean recognition of the monarchy as an institution, which itself derives from the Constitution. These words had no significance other than that of a promise of allegiance to the constitutional system that a democracy had chosen.

The Court concluded that the obligation to take an oath of allegiance to the King was not contrary to the constitutional rule concerning equality.

Languages:

French, Dutch, German.

BIH-2001-3-009 28-09-2001 U 26/01 Request of 25 representatives of the National Assembly of Republika Srpska for the evaluation of conformity of the Law on the Court of Bosnia and Herzegovina (Official Gazette no. 29/00) with the Constitution of Bosnia and Herzegovina

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 28-09-2001 / **e)** U 26/01 / **f)** Request of 25 representatives of the National Assembly of Republika Srpska for the evaluation of conformity of the Law on the Court of Bosnia and Herzegovina (Official Gazette no. 29/00) with the Constitution of Bosnia and Herzegovina / **g)** *Sluzbeni Glasnik Bosne I Hercegovine* (Official Gazette of Bosnia and Herzegovina) 04/02 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
3.3 **General Principles** - Democracy.
3.9 **General Principles** - Rule of law.
4.7.1 **Institutions** - Judicial bodies - Jurisdiction.
4.8.8.2.1 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - Implementation - Distribution *ratione materiae*.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Distribution of powers, principle / High Representative for Bosnia and Herzegovina / State, institution, new, establishment / Venice Commission, opinion / Council of Europe, Venice Commission / Legal remedy, effective.

Headnotes:

Bosnia and Herzegovina is competent to establish a Court of Bosnia and Herzegovina in order to fulfil its constitutional obligations, especially deriving from the principles of democracy and the **rule of law**.

Summary:

The applicants, a group of representatives of the National Assembly of Republika Srpska, requested the Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina to evaluate the constitutionality of the Law on the Court of Bosnia and Herzegovina. This law had been enacted by the High Representative for Bosnia and Herzegovina (High Representative) and published in the Official Gazette of Bosnia and Herzegovina. It established the Court of Bosnia and Herzegovina and regulated its competences as well as procedural matters. A working group, chaired by the Ministry for Civil Affairs and Communications, and composed of members of this Ministry, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the Republika Srpska, and of the Office of the High Representative, had previously agreed on a draft law on a Court of Bosnia and Herzegovina. However, the law had failed to be adopted through the regular procedure. According to the Office of the High Representative the law corresponded not only to the constitutional obligation of Bosnia and Herzegovina, expressed in the opinion of the Venice Commission of the Council of Europe, to establish a Court at state level in Bosnia and Herzegovina, but also to a request of the Peace Implementation Council.

The applicants claimed that the challenged law violated Article III of the Constitution of Bosnia and Herzegovina which regulates the responsibilities of and the relations between Bosnia and Herzegovina and the Entities. They pointed out that the Constitution of Bosnia and Herzegovina did not provide that a judicial system is the responsibility of Bosnia and Herzegovina, but that the organisation of the judicial system was the responsibility of the Entities. Furthermore, they argued that the implementation of the Law on the Court of Bosnia and Herzegovina required the adoption of a number of laws of substantive and procedural nature for which there was no legal basis in the Constitution of Bosnia and Herzegovina.

The Court declared the Law on the Court of Bosnia and Herzegovina to be in conformity with the Constitution of Bosnia and Herzegovina.

With reference to its previous jurisprudence (U 9/00, *Bulletin* 2000/3 [BIH-2000-3-004], U 16/00, *Bulletin* 2001/2 [BIH-2001-2-001], and U 25/00, *Bulletin* 2001/2 [BIH-2001-2-004]), the Court found itself to be competent to review the challenged law although it had been enacted by the High Representative whose mandate derived from Annex 10 of the General Framework Agreement for Peace, the relevant resolutions of the United Nations Security Council and the Bonn Declaration. The Court recalled that while the mandate and the exercise of the mandate were not subject to the control of the Court, it considered itself competent to review acts of the High Representative when he substituted the domestic authorities, thereby acting as an authority of Bosnia and Herzegovina, and the laws enacted by him being, by their nature, domestic laws of Bosnia and Herzegovina.

The Court found that the challenged law did not violate Article III.3.a of the Constitution of Bosnia and Herzegovina ("All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."). It argued that Bosnia and Herzegovina needed and therefore was competent to establish a Court of Bosnia and Herzegovina, fundamentally on the basis of the principles laid down in Article I.2 of the Constitution of Bosnia and Herzegovina ("Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.") and of its internal structure established pursuant to item 3 of the same article. Starting from there, the Court held, that the Constitution of Bosnia and Herzegovina conferred on Bosnia and Herzegovina certain responsibilities in order to ensure its sovereignty, territorial integrity, political independence and international personality (e.g. Articles I.1, II.7, III.1.a, III.5.a, IV.3.a), the highest level of internationally recognised human rights and fundamental freedoms (e.g. Article II.1 of the Constitution of Bosnia and Herzegovina as well as Annexes 5-8 General Framework Agreement for Peace) and free and democratic elections (Articles IV.2 and V.1 of the Constitution of Bosnia and Herzegovina).

The Court emphasised that apart from the responsibilities enumerated in Article III.1 of the Constitution of Bosnia and Herzegovina, there were other constitutional provisions assigning competences to Bosnia and

Herzegovina such as Articles I.7, IV.2 and V.1 of the Constitution as well as Article II of the Constitution of Bosnia and Herzegovina. Moreover, the Court drew attention to Article III.5.a of the Constitution of Bosnia and Herzegovina which established that Bosnia and Herzegovina should assume responsibility for:

1. such other matters as were agreed by the Entities;

2. matters that were provided for in Annexes 5 through 8 to the General Framework Agreement; and

3. matters that were necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina, and that additional institutions could be established as necessary to carry out such responsibilities.

The Court especially pointed out that Bosnia and Herzegovina and both Entities should ensure the highest level of internationally recognised human rights and fundamental freedoms (Article II.1 of the Constitution of Bosnia and Herzegovina), and that the rights and freedoms as set forth in the European Convention on Human Rights were to be applied directly in Bosnia and Herzegovina and should have priority over all other law (Article II.2 of the Constitution of Bosnia and Herzegovina). The Court had particular regard to the general principle of the rule of law being inherent in the European Convention on Human Rights and, more particularly, to the principles of a fair court hearing and an effective legal remedy (Articles 6 and 13 ECHR). The establishment of the Court of Bosnia and Herzegovina, the Court argued, could be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina acted in conformity with the rule of law and in satisfying the requirements of the European Convention on Human Rights as regarded fair hearings before a court and effective legal remedies. Until the Court of Bosnia and Herzegovina would start functioning, there would have been no possibility in the legal system of Bosnia and Herzegovina to challenge decisions issued by the institutions of Bosnia and Herzegovina before an organ which fulfilled the requirements of an independent and impartial tribunal.

The Court also noted that, according to Article VI.3 of the Constitution of Bosnia and Herzegovina, the decisions of the Court of Bosnia and Herzegovina would be subject to review by the Constitutional Court as to their constitutionality.

Cross-references:

- Decision of 03.11.2000 (U 9/00), *Bulletin* 2000/3 [BIH-2000-3-004];

- Decision of 02.02.2001 (U 16/00), *Bulletin* 2001/2 [BIH-2001-2-001];

- Decision of 23.03.2001 (U 25/00), *Bulletin* 2001/2 [BIH-2001-2-004].

Languages:

Bosnian, Croat, Serb (translations by the Court).

CRO-1998-1-007

31-03-1998 U-I-762/19
18 others

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 31-03-1998 / **e)** U-I-762/1996, 18 others / **f)** / **g)** *Narodne novine* (Official Gazette), 48/1998, 995-1005 / **h)** .

Keywords of the Systematic Thesaurus:

1.6.2 **Constitutional Justice** - Effects - Determination of effects by the court.
3.9 **General Principles** - Rule of law.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

5.4.13 **Fundamental Rights** - Economic, social and cultural rights - Right to housing.

Keywords of the alphabetical index:

Tenant, right / Housing, lease.

Headnotes:

The obligation of an owner of a dwelling to provide a lessee with another adequate dwelling in cases of cancelled lease contract is an unconstitutional restriction of the right of property, the **rule of law** and equality.

The consent of an owner of a dwelling for the dweller's absence from the dwelling, and disregard of the fact that there might exist justifiable reasons for the absence of the lessee and his family from the dwelling, is an unconstitutional restriction of freedoms and rights.

A provision which finds relevant the absence of a lessee from the dwelling during the period before the Lease of Dwellings Law became valid has a disguised retrospective effect introduced unconstitutionally.

The legal provision which makes cancelling of a lease contract dependent on the will of a unit of local government or the City of Zagreb, and is insufficiently determined and inadequate to function is not in compliance with the **rule of law**.

Summary:

In the procedure of review of the Lease of Dwellings Law four provisions of the Law were repealed; proposals disputing the constitutionality of the other 13 provisions were not accepted. The repealed provisions stated that the

a. lease of a dwelling may be cancelled only if the lessor provides a lessee with another dwelling, under conditions which are not less favourable to the lessee;

b. the right to a protected rent does not belong to a lessee who, without the consent of the owner of the dwelling, together with the members of his family household, did not use the dwelling for a period longer than the last 6 months before the Lease of Dwellings Law became valid;

c. a lease contract with a protected lessee who receives social allowance or is older than 60 may be cancelled only where a local government unit or the City of Zagreb provides him/her with another adequate dwelling for which the protected rent is paid and the lessee can afford it;

d. a lease contract with a protected lessee may be cancelled only where the lessor provides a lessee with another dwelling, under conditions which are not less favourable to the lessee.

Supplementary information:

In connection with two of the repealed provisions a. and d. the Court determined that its decision shall not produce any effects for a period of 6 months after the day of the publication of the decision (published on 6 April 1998).

Languages:

Croatian.

CRO-1998-1-005 25-02-1998 U-III-1238/

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25-02-1998 / **e)** U-III-1238/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 43/1998, 899-901 / **h)** .

Keywords of the Systematic Thesaurus:

2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.

Keywords of the alphabetical index:

Family member, interpretation / Family, blood relation.

Headnotes:

Application of a legal norm which concerns a right of a person may not be interpreted by courts in a way that their interpretation introduces more restrictions for the subject than the legislator prescribed, otherwise legal certainty and the **rule of law** are violated.

Summary:

The interpretation in question concerned «closer members of a family» and whether they included a grandmother. The question arose in connection with free days which an employee asked for in case of his grandmother's death. The courts denied his right stating that «closer members of a family» include a spouse, children and parents.

The action was found justified and the case returned for renewal of procedure.

According to the law relevant for the case, «closer members of a family» are, among others, blood relations of direct line of succession in ancestry, in *linea recta*. The Court held that the legislator did not specify the level of blood relationship when regulating the right of employees in case of death of blood relations in direct line and that therefore the provision should be interpreted as implying all blood relations in direct line.

Languages:

Croatian.

CRO-1997-1-002 29-01-1997 U-I-697/19

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 29-01-1997 / **e)** U-I-697/1995 / **f)** / **g)** *Narodne novine* (Official gazette), 11/1997, 678-683 / **h)** CODICES (Croatian, English).

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
5.2.2 **Fundamental Rights** - Equality - Criteria of distinction.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Flat, privatisation / Property, socially owned / Privatisation, pricing.

Headnotes:

If the legislator establishes differences among subjects who are in the same position, these differences must be objectively founded and acceptable from the point of view of the Constitution.

There is no constitutional ground for differences between buyers of flats on the basis of the legal entity which is the seller of the flat - whether it is the state or other subjects - or the way in which the flats were acquired in the first place.

The State, when it sells the same commodity as other sellers - namely flats burdened by rights of tenants who live in them - should not be in a position essentially different from the position of other sellers.

The legal provision which defines a flat as adequate if one person is allocated one room with a surface up to 17 square metres is insufficiently precise to be consistent with the principles of the **rule of law** and legal certainty.

Summary:

In this case nine provisions in the Law on Amendments to the Law on the Sale of Flats with Tenancy Rights were repealed.

These Amendments changed the position of tenants essentially as compared with their position in legal text before the Amendments.

The Court held that it is possible and sometimes even necessary to introduce differences, but these should be a result of objectively and legally relevant circumstances, such as different economic conditions, changes of laws which are being brought into conformity with the Constitution, new laws concerning ownership and the land register, improved care for war invalids or changes of stability of domestic currency.

Acts regulating the sale of flats to tenants who live in them are transitional regulations through which the state changes its legislation to bring it into conformity with the Constitution which has eliminated socially owned property and tenancy rights based on such property. This privatisation is carried out through the sale of flats under more favourable conditions than market ones, because the majority of tenants would not be able to buy the flats they live in at the market prices.

Languages:

Croatian, English (translation by the Court).

CRO-1994-3-021 17-10-1994 U-III-418/19

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17-10-1994 / **e)** U-III-418/1994 / **f)** / **g)** *Narodne novine* (Official Gazette), 76/1994 / **h)** .

Keywords of the Systematic Thesaurus:

2.2.2.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
3.9 **General Principles** - Rule of law.

Keywords of the alphabetical index:

Political prisoner.

Headnotes:

The allegation that a law will provoke partiality in its application is not relevant in proceedings in which the Constitutional Court reviews the constitutionality of a legislative act. In such proceedings, the Court does not deal with the application of a law, but decides on the conformity of a law with the Constitution.

A legal definition, if precise enough, does not violate the **rule of law** principle.

Summary:

The ruling of the Court did not accept the motions to review the constitutionality of a provision in the act on the rights of former political prisoners. The provision in question determines who is to be considered a former political prisoner and under which conditions the status of former political prisoners is to be obtained.

Languages:

Croatian.

CZE-2004-1-003

11-02-2004 Pl. 31/03 US The obligation to provide information

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 11-02-2004 / **e)** Pl. US 31/03 / **f)** The obligation to provide information / **g)** *Sbírka zákonu* (Official Gazette), no. 105/2004 / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.3.9 **Sources of Constitutional Law** - Techniques of review - Teleological interpretation.
3.10 **General Principles** - Certainty of the law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.13 **General Principles** - Legality.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
3.22 **General Principles** - Prohibition of arbitrariness.
5.3.24 **Fundamental Rights** - Civil and political rights - Right to information.
5.3.25.1 **Fundamental Rights** - Civil and political rights - Right to administrative transparency - Right of access to administrative documents.

Keywords of the alphabetical index:

Information, classified, protection / Information, obligation to provide / Information, denial.

Headnotes:

Neither legal certainty nor predictability of acts of public power is such that it may be placed above other components of the concept of a "democratic state enjoying the **rule of law**". The protection of the interests of the Czech Republic as a sovereign state is one of the values protected by the Constitution. In cases of potential conflict, while ensuring the effective protection of the state's interests, the lawmakers, as well as the government, should optimise the functioning of the checks and mechanisms protecting both values, and minimise as much as possible the scope for potential arbitrariness in acts of public power.

Summary:

The applicant, the Ombudsman, asked the Constitutional Court to strike out a particular section in the schedule to the Governmental Decree implementing the Act on the Protection of Classified Information, alleging that that section conflicted with the provisions of the Act, as well as with the Constitution and the Charter of Fundamental Rights and Basic Freedoms. The Ombudsman acted within the framework of the application of X. against the Ministry of Foreign Affairs, which kept its human rights policy secret.

The Act on the Protection of Classified Information generally defines classified information as any fact whose unauthorised use could harm the interests of the Czech Republic, and lists the areas in which such classified information may be found.

The Act expressly presumes that the meaning of the term "classified information" would be specified by means of a governmental decree setting out a detailed list of facts that may be classified. In accordance with Governmental Decree no. 246/1998 Coll., aside from the facts expressly listed therein, "sensitive political, security and economic information in the area of international relations" may also be kept secret. The applicant stated that the wording of that provision duplicated and unnecessarily repeated the statutory provision, was not specific and enabled any information to be kept secret. The applicant submitted that by issuing the said decree, the Government had acted in breach of Article 78 of the Constitution, pursuant to which the Government is authorised to issue decrees for the implementation of an act within the limits set out by the act in question. The applicant was of the opinion that by issuing that decree, the government had overstepped the limits set out by the Act on the Protection of Classified Information, a situation that might amount to an unconstitutional interference with the right to information. According to the applicant, the impugned provision was in conflict with the constitutional principles of legal certainty and predictability of acts of public power.

The Constitutional Court requested the opinions of the Government of the Czech Republic, the Ministry of Foreign Affairs and the National Security Agency. Although the Government admitted that there was duplication, it found no inherent conflict in the impugned provision. The Government stated that the only prerequisite for particular information to become classified was that its disclosure could jeopardise the interests of the Czech Republic. According to the Ministry of Foreign Affairs, the incorporation of a more general provision into the list of classified information was absolutely necessary. The National Security Agency stated that to a certain extent, the list of classified information served for only for the purposes of orientation.

The Constitutional Court found that the impugned government decree had been adopted and issued in the manner prescribed by the Constitution. Consequently, the Court proceeded to an examination of the merits.

The Constitutional Court has previously accepted the principle of a more relaxed relationship between laws and decrees, deeming that priority in terms of constitutional legitimacy is the harmony between the meaning and purpose of the law as a whole. One of the main objectives of the Act on the Protection of Classified Information is the protection of the interests of the Czech Republic. The application of the method of teleological interpretation led to the conclusion that the purpose of that law was to ensure, through legal means, that all facts that may be in conflict with the interests of the Czech Republic be kept secret, i.e., including new facts that had yet to be included in the existing lists.

The Constitutional Court referred to the principle of reasonableness, which is another manner of expressing the concept of optimisation. A reasonable restriction of predictability (legal certainty) is one that can still ensure the effective realisation of the purpose of the Act on the Protection of Classified Information. In drawing up the list of classified information, the Government needed to strike the optimal balance between the conflicting requirements of accuracy and specificity on one hand and making an indicative list on the other. To that end, the Government responded by introducing the provision in question.

The Constitutional Court found that the degree of legal uncertainty and unpredictability resulting from the list of classified information was reasonable.

The applicant further complained that the governmental decree could be used to classify information in such a way that an unconstitutional interference with the right of information might occur. The Constitutional Court noted that the room for administrative discretion given by the law might be abused in specific situations to arbitrarily and wilfully keep certain information secret; however, should such a situation arise, the legal system provides for the right to seek protection of one's right to information through the means provided for in the Act on Free Access to Information. According to that Act, a refusal to grant access to such information may be subject to review by an ordinary court, and subsequently by the Constitutional Court.

In light of the above, the Constitutional Court dismissed the application.

According to a dissenting opinion, the application made by the Ombudsman might be deemed to constitute an application for the introduction of proceedings for a "specific review of legal regulations". From a constitutional-law perspective, the impugned regulation should be examined in light of an interference with the right to seek and disseminate information, the violation of which being the primary reason for initiating of proceedings before the Constitutional Court.

Languages:

Czech.

CZE-2003-3-014 11-11-2003 IV 525/02 Proceedings before a body of public power

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 11-11-2003 / **e)** IV 525/02 / **f)** Proceedings before a body of public power / **g)** / **h)** ..

Keywords of the Systematic Thesaurus:

1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
3.10 **General Principles** - Certainty of the law.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Legitimate expectation, protection / Decision, judicial, modification.

Headnotes:

In proceedings before a body of public power, each applicant has a legitimate expectation that if he/she acts in accordance with the law, follows the specific instructions issued by that body, and is successful, that body will deliver a decision with a real prospect of being enforced.

Courts in a state governed by the **rule of law** and in one protecting individual human rights and freedoms are obliged under the Constitution to consider the consequences of their decisions, to take prior actions into account and not to assess the matter solely on the basis of an isolated interpretation of a particular provision. Confidence in court decisions and real enforceability of the law are the fundamental non-legal characteristics of the **rule of law**.

Summary:

The constitutional complaint concerned a decision by a regional court annulling a district court decision dealing with an agreement on the transfer of real estate.

According to the regional court, the complaint was not substantiated, and the issue raised was not one that

could be the subject of a constitutional complaint.

The third party contended that the attorney who had represented the complaint should have drawn her attention to the discrepancy.

The constitutional complaint was allowed.

An assessment of the constitutional legitimacy of an interference with fundamental rights and freedoms by a body exercising public powers consists of the following elements. First, the Constitutional Court must assess the constitutional legitimacy of the legal rule applied. Then, the Court must assess whether the interference complies with an interpretation that conforms to the Constitution and constitutional procedural law. Finally, the Court must assess the application of substantive law.

The Constitutional Court's task is to protect constitutional legitimacy. The Constitutional Court does not examine the correctness of the application of "simple" law, and may do so only if it also finds a breach of a fundamental right or freedom. Arbitrariness in the application of a law or an interpretation that seriously conflicts with the principles of justice constitutes a violation of a fundamental right or freedom.

In the particular case, the Constitutional Court examined whether the interpretation used in the impugned decision of the ordinary court interfered with the fundamental rights and freedoms guaranteed by the Constitution.

In order to decide whether the annulment of the court decision that had been varied would conflict with the complainant's interests, the history of the proceedings had to be considered. The complainant had sought a transfer of real estate and had taken all the steps available to her to support her claim. The third party had raised no objection as to the identification and description of the real property in question. An extract from the property register had used the same identification, description and acreage, and there had been no reason to doubt its accuracy.

The complainant had identified and described the object of the dispute in accordance with the information provided to her by the state. During the proceedings before the district court, she had acted in accordance with the instructions issued by that court. The court had decided on the object of the dispute in accordance with the information provided by the Land Registry Office, which subsequently declined to enter the agreement that had been concluded in accordance with the court's instructions in the land register due to a discrepancy between the actual object of the dispute and its identification number which is a part of the description of the land. At the complainant's request, the district court then varied the decision, which was subsequently quashed by the regional court.

According to the European Court of Human Rights, the concept of "possessions" in Article 1 Protocol 1 ECHR has an autonomous meaning. Therefore, it had to be determined whether the overall circumstances of the case made the complainant the bearer of a substantive interest protected by Article 1 Protocol 1 ECHR, given the relevant legal issues and facts, and regardless of the formal classification of the claim under national legislation *(Zwierzynski v. Poland)*.

When delivering the impugned decision, the regional court had not adequately reflected on the fact that the complainant had a legitimate expectation that the court always conducts its proceedings in such a way that where the complainant is successful, the decision is one with a real prospect of being enforced. Whoever acts in reliance of the information provided by the state is entitled not to have his/her rights injured solely because the state may have changed (and perhaps clarified or adopted a more desirable form of) the system of the identification of data it provides to the public. With the entry into force of the decision, the complainant's claim acquired the nature of property.

The Constitutional Court further examined whether there was an interference with the rights of the third party, which, contrary to the statutory prohibition, had had himself registered as the owner of the real property in question during the dispute. The third party had used the same description and identification of the land as the complainant. To be weighed against the freedom of choice of procedural strategy is the risk that a court

might be manoeuvred into delivering an unenforceable decision. If in the case in question the third party had known the correct description and identification and had relied on the decision being unenforceable, the threat to legal certainty would not have been disproportionate.

In proceedings before a body of public power, each applicant has a legitimate expectation that if he/she acts in accordance with the law, follows the specific instructions issued by that body, and is successful, that body will deliver a decision that has a real prospect of being enforced.

The case dealt with what was perceived as a general problem of the circumstances under which a court, which wishes to enforce a right, may correct its written decision in such a way so as to express the court's will (based on established facts) without jeopardising the principle of legal certainty and the principle of not substituting other judicial decisions for final judicial decisions that have come into effect. The Constitutional Court concluded by noting that constitutional complaint proceedings might concern any decision of a body of public power that might have interfered with a fundamental right or freedom.

The Constitutional Court annulled the impugned decision of the regional court.

Cross-references:

European Court of Human Rights:

- Judgment of 19.06.2001 in case of *Zwierzynski v. Poland*, *Reports of Judgments and Decisions* 2001-VI.

Languages:

Czech.

CZE-2003-3-013 09-10-2003 IV. ÚS 150/01 Public power

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 09-10-2003 / **e)** IV. ÚS 150/01 / **f)** Public power / **g)** / **h)** ..

Keywords of the Systematic Thesaurus:

1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
1.3.4.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of fundamental rights and freedoms.
1.3.5.13 **Constitutional Justice** - Jurisdiction - The subject of review - Administrative acts.
1.4.4 **Constitutional Justice** - Procedure - Exhaustion of remedies.
1.5.4.4 **Constitutional Justice** - Decisions - Types - Annulment.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
4.6.2 **Institutions** - Executive bodies - Powers.
5.3.14 **Fundamental Rights** - Civil and political rights - *Ne bis in idem*.
5.3.38 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law.

Keywords of the alphabetical index:

Powers, transfer, public law contract / Administrative act, constitutional review / Executive body, competence, transfer / Good faith, protection / Administrative act, presumption of correctness.

Headnotes:

One of the elements on which the exercise of public power in a democratic state governed by the **rule of law** is based is the principle of an individual's good faith in the correctness of acts of public authorities and the protection of good faith in rights acquired through acts of public authorities. The principle of good faith operates directly at the level of a subjective fundamental right as the protection of that right. At the objective level, it operates as the principle of the presumption of correctness of acts of public authorities.

The powers vested in a government agency are to be viewed as an expression of state power. Competences are specific delineations of issues in the exercise of powers. The competences of bodies exercising public power are set out by law. Where a body exercises competences delegated by way of an agreement over a matter concerning an individual and resolves the matter by way of an individual act, and where that individual acts in good faith on the correctness of that legal act and on the rights acquired, it is of primary importance to protect the individual's good faith in the correctness of acts through which public power is exercised vis-à-vis that individual.

Summary:

In 1993, the Social Security Department of the Ministry of the Interior ("SSD MI") delivered a decision on the service benefit of the complainant. The director of the Security Intelligence Service ("SIS") ruled in two decisions in 2000 that the complainant was not entitled to that benefit. The complainant filed a constitutional complaint against the decisions of the SIS director, alleging a failure to respect the principles of the presumption of correctness of a legal act and *ne bis in idem*.

The SIS director sought dismissal of the complaint on the ground that he had acted in compliance with the law.

The SSD MI claimed that it had taken a decision on the complainant's request pursuant to an agreement between the SIS and SSD MI.

The Constitutional Court held that Section 75.2 of the Constitutional Court Act applied even though the complainant had not exhausted all remedies available under law to protect his rights. The complaint contained general issues that went beyond the interests of the complainant in the particular case (differences in case-law, multiple categories of persons involved) and had been filed within the statutory limitation period.

One of the elements on which the exercise of public power in a democratic state governed by the rule of law is based is the principle of an individual's good faith in the correctness of the acts of public authorities. Consequently, the nature of the original decision on the service benefit and its impact on the complainant's legal rights were relevant.

Administrative law theory does not strictly differentiate between invalidity caused by lack of jurisdiction on the part of the administrative body issuing the defective act and non-existence of such an act caused by a lack of powers on the part of the issuing body. Concerning non-existent acts, they need to be annulled in the interest of legal certainty, and the principle of protection of rights acquired in good faith must be taken into consideration.

The Constitutional Court heard and determined a similar constitutional complaint on the service benefit in Resolution II. ÚS 164/01. The Court held that state power may only be exercised in cases and within boundaries set by law, and in a manner prescribed by law. No "agreement" is relevant because such an agreement cannot establish by law the powers of the Ministry of Interior over the matter. In the particular case, a body that had not been authorised to do so by law delivered the first decision. From a legal perspective, such a decision is non-existent, as it has been delivered by a body without authorisation to do so. Such a defect is so serious that no decision is deemed to exist.

The same body that had delivered the decision in the above-mentioned resolution delivered the original decision in the constitutional complaint before the Court. The fourth senate stated that strict differentiation between powers and competences had to be insisted on. Powers of state bodies are deemed to mean the very exercise of the state power in the relevant form (i.e., laying down rules or making individual decisions),

while competences are specifically and substantively defined issues involved in the process of the exercise of powers. According to the fourth senate, the agreement made between the SIS and the Ministry of Interior concerned a transfer of competences. The act under review was defective because a body lacking the requisite competences had issued it, even though it was not a body lacking powers. Before such an act is annulled, it must first be subjected to the requisite review governed by the rules of due process. Otherwise, that act may still have consequences for the legal rights of the entity concerned. At the objective level, that conclusion is based on the principle of the presumption of correctness of the acts of public authorities, while at the subjective level, that conclusion is based on the protection of the good faith of individuals in that correctness and the protection of rights acquired in good faith.

The SIS had entered into an agreement with the SSD MI on the handling and processing of service benefit issues, thereby transferring its statutory competence to the SSD MI. The competences of bodies exercising public power are defined by law, and no deviation is possible by way of an agreement between bodies, unless the law expressly provides for the conclusion of such a public law contract. It was inadmissible for the SIS to transfer competences entrusted to it by law to another public authority. However, where a body of state exercises competences that have been transferred in such a way over a matter concerning an individual, and that matter is resolved by an individual legal act, and that individual acts with good faith on the correctness of that legal act and on the rights acquired, the situation must be viewed differently. In such cases, the protection of an individual's good faith in the correctness of acts of public authorities becomes primary, provided that the public authorities have the requisite democratic legitimacy.

Given the requirement that acquired rights be interfered with as little as possible, decisions with *ex tunc* effect are not always appropriate. In some cases, it may place the person involved in an impossible position, especially where the decision or the decision that has been varied is in that person's favour and he/she has used the authority conferred by the decision in other relations as well. The damage (material and other) may be disproportionate, and a decision remedying one instance of unlawfulness may result in another where the decision-making body fails to ensure that rights acquired in good faith are affected as little as possible. Therefore, if the circumstances and the applicable provisions of law permit, it is sometimes better to use the method of varying a decision with *ex nunc* effect.

The Constitutional Court is not a higher instance vis-à-vis administrative bodies. It does not examine the overall lawfulness or correctness of impugned administrative decisions, and the Court may only interfere with those bodies' decision-making by way of a cassation decision where it finds a violation of a fundamental right of the complainant.

The impugned decisions interfered with the complainant's fundamental rights. The body taking the decisions breached the provisions of the Charter at the objective level.

The Constitutional Court did not examine the case from the point of view of substantive law. It noted that the criteria expressed in the European Court of Human Rights decision of 26 November 2002 in application no. 36541/97 in *Buchen v. CR* could not be disregarded.

The Constitutional Court therefore annulled the impugned decisions of the SIS director.

Cross-references:

European Court of Human Rights:

- Judgment of 26.11.2002 in case of *Buchen v. CR* (not published).

Languages:

Czech.

CZE-2003-2-009 11-06-2003 Pl. ÚS40/02 collective agreement

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 11-06-2003 / **e)** Pl. ÚS40/02 / **f)** collective agreement / **g)** *Sbírka zákonu* (Official Gazette), no. 199/2003 / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
4.6.3.2 **Institutions** - Executive bodies - Application of laws - Delegated rule-making powers.
5.4 **Fundamental Rights** - Economic, social and cultural rights.
5.4.8 **Fundamental Rights** - Economic, social and cultural rights - Freedom of contract.

Keywords of the alphabetical index:

Collective agreement, freedom not to join / Collective agreement, application, extension / Collective agreement.

Headnotes:

Protection of the freedom of contract is an intrinsic part of a democratic legal state. It derives from the constitutional protection of property rights pursuant to Article 11.1 of the Charter of Fundamental Rights and Basic Freedoms. The possibility of extending the application of a collective agreement to an ordinary contractual agreement results in a conflict between property rights pursuant to Article 11 of the Charter of Fundamental Rights and Basic Freedoms and the public interest in light of Article 6 of the European Social Charter. The priority of the public interest over property rights must be made conditional to the legitimacy (representative nature) of the collective bargaining system. Such a measure must be an extraordinary one. Individual regulations that do not contain a transparent and acceptable rationale and that deprive the addressees of the option of judicial review are contrary to the principle of the **rule of law**.

Summary:

A group of MPs brought a proposal for the striking down of a provision governing the extension of the binding effect of collective agreements in the Collective Bargaining Act.

The Chamber of Deputies, the Senate and the Ministry of Labour and Social Affairs expressed their views on the proposal. According to the Chamber of Deputies, the extension of the application of a higher-level collective agreement (that is to say, a collective agreement concluded between sector trade unions and unions of employers) was not contrary to international treaties binding on the Czech Republic. According to the Senate, the impugned provision aimed at creating a comparable competitive environment among employers in similar fields; EU law applied a similar approach.

According to the Ministry, similar provisions of law could be found in many European countries. In the case at hand, the Ministry requested that the employer concerned state a position to be taken into account in the decision-making.

The Act had been adopted prior to the date the Constitution came into effect; therefore, the Constitutional Court examined only its compliance in terms of content with the current constitutional order. Collective agreements are the outcome of collective bargaining of social partners. The purpose of the provision of law in question is to ensure social conciliation, to create a mechanism for on-going social communication and provide a democratic procedure for the resolution of potential conflicts between the employers and employees.

The complainant raised four objections: those objections concerned the restriction by higher-level collective

agreements on the contractual freedom of non-participating employers, the lack of judicial protection of such employers, the indefinite nature of the impugned provisions and the restriction on the freedom of association. The extension of the application of a higher-level collective agreement amounted to price regulation because of its general economic nature, as it regulated wages and work conditions of employees. As to the admissibility of price regulation, the Constitutional Court had laid down a specific constitutional framework in its previous case-law regarding the legislators. In its award, Pl. ÚS 24/99, the Constitutional Court had ruled that state regulation had to take into account the possibility of earning profits when setting prices, otherwise the right to engage in business might be restricted. In its award, Pl. ÚS 3/2000, the Constitutional Court had accepted price regulation of rents on the basis of the proportionality principle. In awards concerning agricultural products, Pl. ÚS 5/01 and Pl. ÚS 39/01, the Constitutional Court had stated that the legislator could restrict contractual freedom on the grounds of public interest, when produce was being launched onto the market. In the case before the Constitutional Court, the Court reviewed the acceptability of the priority of public interest arising from the protection of the values safeguarded by Article 6 of the European Social Charter.

In the assessment of fundamental rights, the criteria of suitability, necessity and significance of the fundamental rights and public interest in conflict are applied. The Constitutional Court applies the principle of the minimisation of interference with fundamental rights. The institute of collective bargaining meets the condition of suitability and necessity. In the assessment of the priority of the public interest over property rights, the share of contracting parties in a given market and the exceptional nature of such a measure are relevant. The impugned provision failed to meet the requirement of defining the boundaries of the representative character of collective bargaining in the assessment of the conflicting fundamental rights and the public interest. As to the minimisation of the restriction of fundamental rights, it failed to meet the requirement of the exceptional nature of such measure.

The Ministry is authorised by decree to extend the binding effect of a higher-level collective agreement to employers who are not party to the relevant employers' associations, provided that they engage in similar activities, operate under economic and social conditions similar to those of the contracting parties and are domiciled in the Czech Republic. The Ministry stated in the decree that where higher-level collective agreements exist, their binding effect is extended to employers listed in the schedule to the decree; i.e., to specifically listed entities. The practice departed from one of the fundamental material features of the law (legal regulation), i.e., generality. Arguments favouring that generality are those of division of power, equality and the right to one's own independent judge. The area of application of law resists the adoption of laws pertaining to individual cases. The right to a legitimate judge and independent legal protection rules out individual decrees by the legislators in areas not protected by the principle of "*nulla poena sine lege*". In that respect, Article I, Section 9 of the US Constitution sets out that "no bill of attainder or ex post facto law shall be passed". Individual regulation is in conflict with the principle of the rule of law. The regulation set out above provides an adequate framework of interpretation to lay down the conditions of extension of the application of a specific higher-level collective agreement, in view of the analogous position of employers who are party to employers' unions, and employers who are not.

The wording of the impugned provision did not satisfy the requirement of completeness, as it lacked the representative character of collective bargaining as well as the particular characteristics of a measure restricting title, stemming from the maxim of guarantee of the fundamental right to judicial protection. From the point of view of proportionality, the provision lacked a definition of the boundaries of the representative character of collective bargaining. By setting such boundaries, the objection regarding the conflict between the institute of extension of the application of the higher-level collective agreement and the right to free association ceases to be relevant. The Constitutional Court struck down the impugned provision, effective as of 31 March 2004.

Supplementary information:

- Pl. ÚS 24/99, *Bulletin* 2000/2, *Collection of Decisions and Judgments of the Constitutional Court* - vol. 18, no. 73;

- Pl. ÚS 5/01, *Collection of Decisions and Judgments of the Constitutional Court* - vol. 24, no. 149;

- Pl. ÚS 39/01, *Collection of Decisions and Judgments of the Constitutional Court* - vol. 28, no. 135;

- Pl. ÚS 3/00, *Collection of Decisions and Judgments of the Constitutional Court* - vol. 18, no. 93.

Languages:

Czech.

CZE-2003-1-003 11-03-2003 II. ÚS 237/02 Party to the proceedings

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11-03-2003 / **e)** II. ÚS 237/02 / **f)** Party to the proceedings / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.22 **General Principles** - Prohibition of arbitrariness.
4.7.2 **Institutions** - Judicial bodies - Procedure.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Customs, authority, decision / Administrative act, judicial review / Administrative proceedings, parties.

Headnotes:

The fact whether the complainant acted in his/her own name or for and on behalf of the represented person was crucial to the decision in question, and cannot be deemed to constitute a manifest error in writing or calculation, or any other manifest error. Typos or errors in sums may constitute a manifest error. The content of the decision cannot be amended. Such an approach would give rise to substantiated doubts as to whether the customs authority concerned decided correctly, would imply arbitrariness of its decision and is clearly contrary to the principle of legal certainty inherent in the term of a "state governed by **rule of law**".

The administrative court ought to have addressed the complainant's objections in relation to the preceding administrative decisions. To accept the opinion that the identification of the principal debtor was resolved with final effect even before the customs authorities rendered their decisions on the assessment of customs debts of the complainant would result in unforeseeable consequences for all persons incorrectly reported in customs declarations as customs agents.

Summary:

The complainant lodged a constitutional complaint contesting decisions rendered by the regional court, customs directorate and customs office. He claims a violation of his fundamental rights.

The Customs Authority assessed duty and VAT payable by the complainant. The complainant argued in an appeal that he had complied with his obligations under the applicable provisions of the Customs Act, and that his compliance had been confirmed by the Customs Authority. The appeal was dismissed. The complainant applied to a regional court that dismissed his motion.

The regional court argued for the dismissal of the complaint, as the complainant raised identical objections therein.

The customs directorate argued for the dismissal the complaint, as the directorate had proceeded in accordance with the law.

The customs office stated that customs bodies involved in the customs procedure had acted in conformity with the relevant provisions of the Customs Act.

The power of attorney granted to a driver shows that he is the respective company's employee and is authorised to conduct customs services business related to import and export of goods. It did not indicate that the complainant would be authorised to represent the company directly and would thus act in his own name.

The Constitutional Court does not interfere with the decision-making of ordinary courts. It does not assume the right of review and supervision of their activities, provided that the courts act in accordance with the substance of Chapter Five of the Charter. Interpretation of legal regulations by ordinary courts may be so extreme at times that it exceeds the defined boundaries and interferes with one of the fundamental rights guaranteed by the Constitution, as occurred in the case in question.

In the case at instance, the question is whether the administrative court ought to examine the lawfulness of administrative decisions. The Court assesses the legality of an administrative decision if such decision was binding and whether a special procedure may govern its review.

The initial administrative decisions were decisions of release of the goods into the proposed direct transit regime by virtue of confirmation of TCP's by customs authorities. The decisions in question do not give grounds and information regarding remedies. Customs procedure is also governed by the principle that all first-instance decisions of the relevant customs authority may be appealed. Therefore, a due remedy could be sought even in the case of the confirmed TCP's.

The complainant acted in his capacity as employee and did not consider himself a party to the customs proceedings. Therefore, he did not avail himself of a remedy. Financial consequences only affected the complainant after subsequent decisions were delivered.

The customs directorate altered the grounds for their decisions.

The tax administrator amends or cancels upon request or *ex officio* a tax liability assessed by virtue of a decision where a manifest error in calculation, writing or otherwise has occurred in the assessment of the tax liability, in particular where the assessment concerns one and the same kind of tax and taxpayer. This provision may be applied only in cases of manifest error in data, adequately substantiated by findings establishing the correct information. The actual factual findings or their analysis that served to establish the obligation to pay the customs debt cannot be changed.

According to the amended decision, the customs directorate had a power of attorney at its disposal and clearly subsequently changed its legal analysis of the instrument to make it conform to its decision. Therefore, this was not a case of making the original decision compliant with the evidence. The fact whether the complainant acted in his own name or on behalf and for the benefit of the person he represented was crucial to the decision. The content of the decision cannot be changed. Such an approach would amount to arbitrariness of decision and is contrary to the principle of legal certainty. The impugned decisions of the customs directorate are not subject to review.

The proceedings from which the impugned ruling resulted was not fair. The Constitutional Court cannot accept an exercise of state power that clearly ignores a requirement taken for granted in a state governed by rule of law, i.e., that the purpose of the law is to yield a fair decision. The administrative court did not give sufficient consideration to the objections raised by the complainant, and paid insufficient attention in particular to the fact that the complainant was not a *de facto* party to the customs proceedings. The Constitutional Court quashed the contested decisions.

Languages:

Czech.

CZE-2002-1-001 05-12-2001 I. US 535/2000 Conduct of state authorities

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 05-12-2001 / **e)** I. US 535/2000 / **f)** Conduct of state authorities / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
5.3.13.1.5 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Non-litigious administrative proceedings.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Property, private, restitution / Restitution, conditions, citizenship / Restitution, claim, time-limit / Assistance, obligation.

Headnotes:

The constitutional principle of the **rule of law** implies that the conduct of the State towards its citizens is in conformity with obligations it has set for itself, while the citizen, on the basis of legal certainty, has the right to rely on the trustworthiness of the State when complying with its obligations.

A restitution claim received outside the requisite time-limit should be accepted when the delay is the consequence of the state's negligence, and when the applicant fulfilled all the conditions set by the law within the imposed time-limit.

Summary:

In its constitutional complaint the applicant claimed that, by the procedure of public authorities, the applicant's rights and freedoms guaranteed by the Constitution were violated.

After reviewing the files and considering all the circumstances, the Constitutional Court concluded that the constitutional complaint was justified. Even though the applicant had made a mistake, the conduct of public authorities was even more defective. The applicant's restitution claim was rejected due to a failure to comply with the conditions of citizenship, the certificate of which having not been issued by the competent authority within the due period of time.

The applicant acquired American citizenship by naturalisation and should have known that acquiring American citizenship causes the loss of Czechoslovak citizenship. After returning to Czechoslovakia, he asked for the citizenship again. The District Authority issued a document confirming that his citizenship rights were not affected; he even acquired an identity card. He applied a restitution claim, which was fully acknowledged. The applicant took over agricultural property and started to exercise his ownership title.

The applicant's cousin who subsequently disputed the existence of the applicant's citizenship also filed a claim for the restitution of the same property. The applicant therefore addressed the District Authority with an application for a certificate of citizenship and was assured that his application would be completed in an orderly and timely manner so that he could lodge his claim within the due period.

The applicant relied on the statement of the state authority confirming that he had not been released from his ties to the state; the subsequent issuance of the identity card and the further procedure of the state authorities substantiated his belief that he was in conformity with the citizenship conditions for the restitution, and that he was therefore undertaking steps that were reasonable and sufficient.

He subsequently relied on the administrative authority which should have issued the certificate within the period of time defined by the Administrative Code: a maximum of 30 days. However, the authority issued the document as late as 45 days after the filing of the application, which was already after the deadline for the applicant's application for restitution claim had lapsed. The District Authority had caused this delay even though the application complied with all requirements and there was no reason to reject the application. Furthermore, the above circumstance caused the rejection of the claim of the applicant who otherwise complied with all conditions for the restitution.

The Constitutional Court noted the statement of the District Land Authority in which it pointed out that following the rejection made in the resolution of the Land Authority, this Authority could not have acted differently than to observe the previous legal opinion of the Regional Court; at the same time it emphasised that the Land Authority did not identify itself with this opinion. The Constitutional Court further noted that the applicant introduced his restitution claim at the time of the effectiveness of the amendment to the law where one provision orders "the relevant bodies of state authorities... to provide assistance to a person who claims to be a beneficiary" and "to contribute to the clarification of a matter".

All negative consequences of state negligence would have been remedied if the District Authority had issued the citizenship certificate to the applicant in time. The fact that the State did not exercise its authority within the limits set by the law and in a way stipulated by the law was not a result of the applicant's conduct, but of the State itself; such a law cannot therefore be applied *ex post facto* as a tool for limiting the ownership title already previously recognised by the state, to which the protection pursuant to Section 11 of the Charter of Fundamental Rights and Freedoms is applicable.

In the instant case, the Constitutional Court ascertained the violation of Section 2.3 of the Constitution, according to which the purpose and objective of the state authority is to serve citizens, as well as of the provisions of Section 4.4 of the Charter of Fundamental Rights and Freedoms, according to which the use of provisions regarding limiting fundamental rights and freedoms must be based on their essence and meaning. Such limitations are not to be used for purposes other that those for which they were established. The Constitutional Court also noted that the way the State acted against the applicant not only caused damage to him, but also violated the constitutional principle of legal certainty. The Constitutional Court therefore cancelled the challenged decisions.

Languages:

Czech.

CZE-2001-2-012

12-07-2001 Pl. US Protection of Classified Information Act 11/2000

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 12-07-2001 / **e)** Pl. US 11/2000 / **f)** Protection of Classified Information Act / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.3.2.4 **Constitutional Justice** - Jurisdiction - Type of review - Concrete review.
1.5.4.4 **Constitutional Justice** - Decisions - Types - Annulment.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.

3.17	**General Principles** - Weighing of interests.
3.18	**General Principles** - General interest.
3.19	**General Principles** - Margin of appreciation.
3.22	**General Principles** - Prohibition of arbitrariness.
5.1.3	**Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.3	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.18	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.
5.4.4	**Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

State, interest / Secret service / Security service / Information, classified, protection / Security clearance.

Headnotes:

It is in the interest of the state to define security risks generally because the importance of specific individual security risks may change over time. The interest of the state cannot legitimise the creation of security risks that would not be constituted by the legislature but by administrative bodies. Legislation which makes it possible for executive administrative bodies never to give reasons for their decisions, whereby the applicant may never learn or even guess whether and why he was found a personal security risk, is in contradiction with the basic principles of the state governed by the **rule of law**. For security checks of natural persons, the law stipulates a special modification of administrative proceedings. This is not unconstitutional because the decisive aspect is whether the special proceedings safeguard constitutionally guaranteed fundamental rights of persons investigated.

To be consistent with the Constitution, legislation must exclude the judicial review of public authority decisions which, by their nature, fall beyond the scope of fundamental rights and freedoms as defined in the Charter on Fundamental Rights and Basic Freedoms. The protection of classified information and the conditions that must be met by people who have access to it is a very specific issue and it is not possible to guarantee all procedural rights of the people in question. However, not even the specific characteristics of protecting classified information is sufficient reason for diminishing the constitutional protection of the rights of security-checked persons.

Summary:

As well as making a constitutional complaint, the complainants requested the annulment of certain provisions of the Protection of Classified Information Act. Opinions on the complaints were expressed by the Czech Security Information Service, the Chamber of Deputies, the Senate, the Ministry of the Interior and the National Security Authority. The purpose of the Act was to define which information would be classified in the interests of the Czech Republic, the method by which it will be protected, the jurisdiction and powers of state institutions in the performance of their duties in protecting classified information, the duties of natural persons and legal entities, and the responsibility for the violation of duties under the Act.

Individual fundamental rights need to be assessed in compliance with the principle of proportionality. The interest of the state is a vital interest which legitimises a degree of restriction on individual privacy. The state cannot behave arbitrarily towards its citizens, and it cannot restrict their fundamental rights beyond an absolutely necessary limit. When restraining fundamental rights and freedoms, the state has to respect both formal requirements of restriction, as defined by law, as well as the material requirements (the need to keep in mind the essence and purpose of basic rights). By restricting access to classified information only to people who fulfil statutory requirements, the state tries to protect its own interests, which is a fully legitimate objective. The stipulation of adequate statutory requirements for persons with access to classified information cannot be considered as unconstitutional, and it is also in accordance with the case law of the European Court of

Human Rights. National legislation must provide a degree of protection against arbitrary interventions by state institutions. The law must provide a sufficiently clear definition of the extent of, and conditions for, the execution of such powers with respect to the intended legitimate aim in order to provide individuals with adequate protection against arbitrariness. Not even the relative freedom enjoyed by the law-maker gives him the right to use laws for the violation of the essence and substance of the right to the free choice of profession and training, and to start a business or engage in any other commercial activity.

Only a law whose consequences are clearly predictable fulfils the requirements for the operation of a materially conceived democratic state governed by the rule of law. This, however, was not the case with the issue in hand. The statutory definition of security risks has to be general enough to enable due consideration by the relevant state organ and, above all, a classification of specific cases according to specific security risks. It is therefore necessary to reject legislation which, besides examination of real security risks, would allow for the examination of risks, even fictitious ones, which are not listed in the law. The only definition of security risks that is constitutionally acceptable is a definition which gives relevant authorities a possibility to use their discretion, but not for the creation of new risks not sanctioned by the law. The fact that consequences are unforeseeable opens up a possibility of potentially arbitrary attitudes of relevant authorities. The law-maker may set some statutory limitations for the performance of some professions or activities. This, however, must be done in an unambiguous and foreseeable manner, without any margin being left for any arbitrary attitudes on the part of state organs. The stipulated list of security risks provides room for arbitrary restrictions to the performance of some professions and activities which are not clearly defined in advance; such a practice is not in conformity with the Charter. The guarantee of a free choice of profession is not only a part of the catalogue of national human rights but is also strongly reflected at the level of international law in the European Social Charter.

To fulfil the conditions for clearance at the security classification level of "Restricted", a person must be a citizen of the Czech Republic, must have full legal capacity, must have reached the required age and must not have a criminal record. The requirements for a clearance at the "Confidential", "Secret" and "Top Secret" levels include also a suitable personality profile and reliability from the security point of view. It is therefore clear that currently effective legislation does not allow a person not meeting any one of the above conditions to be given a security clearance, and that the person will not be given any reasons for the decision. The wording of the contested provision also means that applicants are never given the reasons as to why they were not given the security clearance. It is therefore practically impossible for applicants to remove from their records the reasons for which they were refused the clearance even in cases when this might be possible and when the fact that the reasons were communicated to them would not constitute a threat to the interest of the state or of any third persons. The consequences of the non-issuance of the clearance certification will have a very significant impact on the person in question both from a legal point of view (as a reason for the termination of employment) and as regards his personal situation (for instance, a negative reaction from his colleagues and relatives). The law can stipulate the conditions and restrictions for people entering certain professions or engaging in certain activities. These conditions and restrictions must be transparent and foreseeable. The person whose rights are being restricted should be given an opportunity for an appropriate defence of his rights. It is inexcusable that there exist situations where giving reasons why a person failed in the security clearance procedure is absolutely prohibited. In the new legislation, the law-makers should find an appropriate constitutional way of responding to, and harmonising, the private interests of the applicant with public interests.

The Administrative Code represents general procedural legislation, the nature of which need not be applicable to all forms of administrative proceedings, and some types of administrative proceedings may need to be regulated by a special legislation. It is up to the law-makers to decide what format that will have. The Constitutional Court can only pronounce on its constitutionality. The procedure used in security checks of natural persons is governed by special regulations, and the Administrative Code does not apply to it with the exception of the section on fines. When the appropriate security office carries out a security check on a natural person, it either sends the applicant a clearance certificate or a letter informing him that he does not meet the necessary conditions. This notification is a special type of an administrative decision that may be contested within 15 days by a written complaint to the director of the office. He investigates the matter and either grants the complaint or rejects it. The applicant must be informed about the result in writing. According to the existing case law of the Constitutional Court, the decisive aspect is whether the decision really

interferes with the legal sphere of the individual, rather than how it is classified. It is thus clear that the act stipulates a special modification of the administrative proceedings for security checks on natural persons, which differs from the administrative proceedings specified in the Administrative Code. The exclusion of this type of proceedings from the general type of proceedings does not violate constitutional principles.

The failure to pass a security check may be the reason for losing one's job. If an applicant does not successfully pass such a check, he may no longer be able to work in his current position and his employment contract may be terminated. The decision to refuse security clearance for access to classified information may significantly influence the professional status of the applicant and thus also his basic right to the free choice of a profession. In this case, the lawmakers must also guarantee the possibility of the review of administrative decisions by an independent judicial body, even though a special type of procedure to differentiate between individual cases may be necessary. Security checks give considerable powers to a single executive administrative body, and its decision may significantly affect the life of the checked person because the office which carries out security checks also decides on the remedies against the person. Because there are no provisions for a review by an independent and impartial institution, the person being checked is practically at the mercy of the only institution which, in this situation, cannot be considered as independent or impartial.

It is necessary to differentiate carefully between a decision about who will be given a clearance for access to classified information, which rests with the executive branch, and a judicial review of that process, which must be the exclusive right of the independent judiciary. In view of the specific features and the importance of the decision-making process in matters of classified information, it is not always possible to guarantee all standard procedural safeguards of due process, including an open hearing. Even in this type of proceedings, the lawmakers must provide adequate statutory guarantees for judicial protection, even it will be a fairly specialised and differentiated type of protection.

Objections may also be raised against the Act as a whole. This, however, was not the subject of the complaint. The Constitutional Court nevertheless presumed that parliament would deal with the Act in a comprehensive way, rather than only with the contested provisions that were annulled by its decision. The provisions contested were therefore partially annulled by the Constitutional Court, the enforcement of the judgment was postponed until 30 June 2002, and the complaint was partially rejected.

Languages:

Czech.

CZE-2001-2-010 27-06-2001 Pl. 16/99 US Administrative code

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27-06-2001 / **e)** Pl. US 16/99 / **f)** Administrative code / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.3.5.13 **Constitutional Justice** - Jurisdiction - The subject of review - Administrative acts.
1.3.5.15 **Constitutional Justice** - Jurisdiction - The subject of review - Failure to act or to pass legislation.
1.4.9 **Constitutional Justice** - Procedure - Parties.
1.6.5.5 **Constitutional Justice** - Effects - Temporal effect - Postponement of temporal effect.
3.9 **General Principles** - Rule of law.
3.13 **General Principles** - Legality.
3.20 **General Principles** - Reasonableness.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
5.2 **Fundamental Rights** - Equality.
5.3.13.1.5 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Non-litigious administrative proceedings.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.
5.3.13.19 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Equality of arms.

Keywords of the alphabetical index:

Administrative law / Sanction, administrative, judicial protection / Decision, administrative, assessment / Proceedings, participation, restriction / Failure to act, administrative body / Representation, mandatory / Legal aid.

Headnotes:

The current regulation of the administrative courts shows serious constitutional law deficiencies. Some activities of the public administration, like its potential inactivity, are not subject to review by the judicial branch of power. Not everyone whose rights may be affected by an administrative decision has the right to make an application to the courts. Even if he or she does have that right, a fully fair trial under Article 6.1 ECHR is not guaranteed, although that is the case in a number of situations. A court decision is then final and, with the exception of a constitutional complaint, non-reversible, which leads to inconsistent case law as well as to an unequal position for the administrative body, i.e. to a situation in conflict with the requirements of a state governed by the **rule of law**. The finality of certain decisions can even lead to a denial of justice. Finally, the exercise of the administrative judiciary is organised in a manner which ignores the fact that the Constitution states that the Supreme Administrative Court is part of the court system.

Summary:

During 1999-2001 some submissions to annul specific provisions of Part V of the Civil Procedure Code (the "CPC") on the administrative court system were submitted to the plenum of the Constitutional Court. The Court decided to join all these submissions in one single set of proceedings. After the matters were joined the court received additional petitions which were rejected on the grounds of a pending suit, and the complainants were given the status of a secondary party. The Chamber of Deputies, the Senate of the Parliament of the Czech Republic and the Ministry of Justice expressed opinions on these submissions.

There was no dispute about the fact that the manner in which the administrative court system was restored after 1991 was understood as a provisional solution. The Constitution expressly incorporated the Supreme Administrative Court into the court system without postponing the establishment of this court in the transitional and final provisions. Thus, the constitutional order envisaged a supreme body in the administrative court system while the law regulating this branch of the judiciary was constructed quite differently, as it created three independent levels of decision-making, and this decision-making is final, with the exception of pension matters.

Further, the current system did not provide judicial protection against unlawful procedures or interventions of the public administration which did not have the character and form of an administrative decision. There was no means for judicial protection against the inactivity of an administrative authority and the administrative courts could not decide directly about the validity of public administrative acts. In these cases the Constitutional Court was often competent.

A separate problem existed in the so-called administrative punishment, where the Constitutional Court annulled part of the Administrative Offences Act, but this area was not in accordance with the European Convention of Human Rights. Accusations of crime, under the case law of the European Court of Human Rights, include in practice proceedings on all sanctions imposed on individuals by administrative authorities for administrative offences or other administrative transgressions, as well as proceedings on sanctions imposed in disciplinary proceedings, or imposed in analogous proceedings on members of chambers with compulsory membership. The Constitutional Court then has to be endowed with the power to consider not

only the legality of a sanction but also its reasonableness.

The Constitutional Court stated that although the current administrative court system was generally in accordance with the Constitution and the Charter on Fundamental Rights and Basic Freedoms, as far as procedure and jurisdiction are concerned, it was not in accordance with the Human Rights Convention, which requires that a court or a body similar to a court decide the case. Thus, under Czech regulations, the court could only annul an unlawful decision, not a substantively deficient one. This meant that the administrative discretion of a dependent body cannot be replaced by independent judicial consideration. The Civil Procedure Code was satisfied with mere review of legality, without regard to the specific nature of a matter, and its provisions regulate in detail only this review, which was in conflict with the Convention and therefore also with the constitutional order of the Czech Republic. This deficiency could not be solved otherwise than by a fundamental change in the structure and powers of the administrative judiciary.

As regards the problem of the constitutionality of procedural regulation, which the administrative judiciary in most cases restricts to one level, it was stated that neither the Constitution nor the Charter guaranteed a multi-level judiciary as a fundamental right, and it also cannot be derived from international treaties. The requirement to create a mechanism for unifying case law (even if only in the form of a Court of Cassation complaint or other extraordinary form of appeal) follows from the requirements placed on a state which defines itself as being governed by the rule of law. The non-existence of such a mechanism then leads to insufficient pressure to cultivate the public administration as a whole and to the feelings of the public administration bodies that they are exposed to judicial review which lacks a unifying function. The absence of any means of unifying the case law of the administrative courts forces the Constitutional Court into the role of "unifier", which is inconsistent with its position.

This situation creates a basic inequality between legal entities and natural persons, on one side, and administrative authorities, on the other side, as the state has no means to defend itself against the sometimes diametrically opposed decision-making of the administrative courts. The Executive has no opportunity to call for assessment of administrative decisions by the supreme judicial body if it believes that it is in conflict with the law. Making it a condition that applicants have active standing to file an administrative complaint on previous participation in administrative proceedings can, in some cases, lead to a situation where persons whose rights or obligations were obviously the subject of proceedings or whose rights could be affected by a decision of a public administration body were excluded from the right to file a complaint. This leads to the existence of persons whose rights are affected by an administrative decision being in unequal positions, which is in conflict with the Charter and the Convention.

The legislature itself had already corrected certain special regulations, and the Constitutional Court also proceeded in this spirit. The Constitutional Court was aware of the fact that even restricting participation in proceedings to the claimant and the defendant is a step backwards in comparison with the First Republic legal regulation, which is also admitted in the Commentary to the Civil Procedure Code, as it speaks about the fact that this provision evokes doubts from a constitutional viewpoint and will require effective remedy *de lege ferenda*. It should be a matter of general interest for the administrative court not only to concern itself with the claimant's objections but to arrange for all persons who were somehow involved in the matter to have the opportunity to defend their rights before a court.

Concerning the reservations of the Fourth Chamber of the Court about the constitutionality of the provisions, it must be stated that mandatory representation, whether by an attorney or by other specialists, is not usual before the administrative courts of the first instance in Europe. Despite this unusual situation, and factual strictness of the Czech regulation, the current concept could not be criticised for being in conflict with the constitutional order. An argument against the possible objection of limited access to the court is the attempt to ensure the equality of the parties in proceedings before the administrative court, i.e. that the plaintiff is not at a disadvantage against the defendant administrative body, which is usually represented by a qualified state official. Mandatory representation should generally serve to effect the principle of equality of arms. It is a matter for the legislature, in the new codification, to evaluate the necessity of mandatory legal representation generally, as well as whether legal assistance can be provided only by persons with a university level legal education. The Constitutional Court also pointed out that in the case of mandatory legal representation, it was necessary to ensure, more so than has been the case until now, the availability of such representation for

socially disadvantaged persons.

The plenum of the Constitutional Court decided to annul the whole of Part V of the Civil Procedure Code since, in its opinion, the above-mentioned deficiencies in constitutionality could not be meaningfully resolved by partial derogations. After considering all the circumstances, especially the work in progress on the reform of the administrative court system, the Constitutional Court decided to postpone the enforcement of the annulment verdict until 31 December 2002. The Constitutional Court was convinced of the need for a lengthier *vacantia legis* for such a fundamental change, from which it follows that passing new regulations is a task for the present legislative body.

Languages:

Czech.

CZE-2000-1-009 12-04-2000 II. US 559/1999

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12-04-2000 / **e)** II. US 559/1999 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.3.5 **Constitutional Justice** - Jurisdiction - The subject of review.
3.4 **General Principles** - Separation of powers.
3.10 **General Principles** - Certainty of the law.

Keywords of the alphabetical index:

Norm, absolute nullity, possibility for review.

Headnotes:

A legal act issued by a body not competent to issue it is an entirely null and void legal act - a non-act which creates obligations for nobody. In the normative world, it is non-existent, so that strictly speaking it is a non-norm, and cannot even be annulled.

No authority can be found in the national legal system for the issuing of a declarative judgment concerning a case of nullity. Nonetheless, legal practice and theory have led to the conclusion that, owing to the difficulty involved in interpreting acts that are null and void, it must be possible, in the interest of the effective supervision of legality, to contest even such legally non-existent norms.

An act, even if it is null and void, must, as a consequence of its infringement of constitutional competencies, be annulled, as the alternative state of affairs would create an undesirable and intolerable effect on the certainty of the law in a given society, particularly when the Parliament's competence is concerned. No body of state authority, even if one of the highest, may appropriate authority which does not fall within its competence. That would constitute a violation of the **rule of law**, and in particular of the principle that nobody may intrude upon the rights and freedoms of others, regardless of whether natural or legal persons are concerned or whether the matter involves local self-government, other than in pursuance of the protection of law, and only in the manner provided for by law.

Summary:

The facts of the case were summarised under Pl. ÚS 1/2000, [CZE-2000-1-008]. That case and this were connected in that this case arose out of the other one, in view of the need to resolve the constitutionality of

applicable statutory provisions prior to making a determination of the specific case.
Languages:

Czech.

CZE-2000-1-008 05-04-2000 Pl. US 1/2000 US Constitutional justice - Types of claim

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05-04-2000 / **e)** Pl. US 1/2000 / **f)** Constitutional justice - Types of claim / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.2.1.4 **Constitutional Justice** - Types of claim - Claim by a public body - Organs of federated or regional authorities.
1.3.4.4 **Constitutional Justice** - Jurisdiction - Types of litigation - Powers of local authorities.
1.3.4.9 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of the formal validity of enactments.
1.3.4.10.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of the constitutionality of enactments - Limits of the legislative competence.
1.3.5.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law - Laws and other rules in force before the entry into force of the Constitution.
3.4 **General Principles** - Separation of powers.
3.6.2 **General Principles** - Structure of the State - Regional State.
4.5.2 **Institutions** - Legislative bodies - Powers.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.8.4.1 **Institutions** - Federalism, regionalism and local self-government - Basic principles - Autonomy.
4.8.8.3 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - Supervision.

Keywords of the alphabetical index:

Parliament, administrative authority, regional self-government / Roma.

Headnotes:

The adoption of the Constitution (Constitutional Act no. 1/1993 Sb.) affected above all the removal of the foundations of the old constitutional order, which had been a system of national committees built upon the Soviet model - from local through district and regional national committees up to the Czech National Council (as the "national committee of the highest level"), which were conceived of as a body of state administration and state power. According to Article 102 of Constitutional Act no. 143/1968 Sb., which was in effect until 31 December 1992, the Czech National Council was even designated the "supreme body of state power". This system was replaced by a state based on the **rule of law** and on the separation of powers - legislative, executive and judicial - of which the Parliament, composed of the Assembly of Deputies and the Senate, exercises solely legislative power and lacks any sort of executive or judicial power.

The sole executive competence of the Assembly of Deputies is its authority to take disciplinary action against its members and to decide whether to consent to their criminal prosecution. Also it performs further non-legislative functions, consisting in the power to set up an investigating commission for the investigation of matters of public interest, as well as the power to put parliamentary questions to the government and individual ministers. The Assembly of Deputies may not intrude in any way upon the executive power or upon the exercise of local self-government, with the exception of making proposals, recommendations, etc.

If the Constitutional Court were to reject a constitutional complaint on procedural grounds alone, on the basis that the act in question is null or quasi-legal, one which nobody is required to heed or to obey, and the complaint therefore challenged what was in effect a non-existent legal act, it would not be fulfilling its duty as the guarantor of the constitutionality of the state based on the **rule of law**.

Summary:

The city council of Ústí nad Labem brought a constitutional complaint against the Assembly of Deputies, the lower chamber of the Parliament. The complaint was filed under § 72.1.b of the Constitutional Court Act, which provides for a special form of constitutional complaint whereby a representative body of a municipality or region can complain that the State has infringed their constitutionally guaranteed right to local self-government, as guaranteed by Article 8 of the Constitution.

The dispute began with the City Council's decision to authorise the construction, in a residential area, of a dividing wall, the ostensible purpose of which was to shield some residents from an allegedly noisy housing area in which the residents were mostly Roma. The decision was adopted pursuant to a statutory provision endowing municipalities with the authority to decide on construction permits. Due to the extensive international notoriety of the decision and the strong criticism to which it had been subject, the government had, to no avail, exerted pressure on the Council to change its decision.

Then in reference to the authority vested in it under §§ 62 and 62a of the Municipalities Act (giving the parliament authority to correct unjust measures), the Assembly of Deputies adopted a resolution annulling the Council decision.

In its complaint the Ústí nad Labem City Council requested the Constitutional Court both to void the parliamentary resolution annulling its decision to construct the wall and to annul §§ 62 and 62a, the statutory provisions on the strength of which the Assembly of Deputies had acted.

As the Constitutional Court's jurisdiction to review the constitutionality of the statutory provisions had been invoked in the context of an individual constitutional complaint, its power to do so was dependent on the admissibility of the complaint. Since the complainant asserted that the Assembly of Deputies had adopted the resolution in question on the basis of a non-existent authority (which would make it an *ultra vires* act and therefore null and void *ab initio*), before the Court was entitled to review those provisions, it had to resolve the difficult issue of whether it has authority to review a non-existent legal act. The Court held that it has authority to review an act that legally is non-existent. And on the basis of that finding, it held that it had the power to review the constitutionality of the statutory provisions in question.

In reviewing §§ 62 and 62a, which had been adopted prior to the present Constitution, the Court determined that they had regulated a power belonging to the parliament (then called the Czech National Council) under the previous constitutional order. That order differed markedly from the present one, notably in respect of the fact that the Czech National Council had been specifically designated the "supreme body of state power" and had been endowed with administrative authority in addition to its legislative authority. The introduction in the present Constitution of the separation of powers means that parliament is now limited to exercising legislative power. Accordingly, §§ 62 and 62a grant an authority which, under the present constitutional order, the parliament may not exercise. In fact, even if not explicitly, the 1993 Constitution had derogated from §§ 62 and 62a, so that since 1993 these provisions have been inapplicable even though they are still part of the legal order.

The Court noted that this was not an isolated, one-off decision, but that its significance exceeded the bounds of this case, as the Assembly of Deputies has continued to consider that it has the legal authority to annul measures adopted in the context of local self-government and had done so five times in the preceding three years.

The Constitutional Court emphasised that it was considering and deciding solely the constitutional law issue put to it concerning the authority of the Assembly of Deputies to annul a municipal decision. The fact that it found the parliamentary resolution to be unconstitutional cannot be taken as indicating approval of the

municipal resolution.

Languages:

Czech.

CZE-1999-1-003 03-02-1999 Pl. 19/98 US The Duty of Courts to Interpret Statutory Provisions in Conformity with Constitutional Principles

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 03-02-1999 / **e)** Pl. US 19/98 / **f)** The Duty of Courts to Interpret Statutory Provisions in Conformity with Constitutional Principles / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.2.2.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
5.3.14 **Fundamental Rights** - Civil and political rights - *Ne bis in idem*.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.
5.3.26 **Fundamental Rights** - Civil and political rights - National service.

Keywords of the alphabetical index:

Material law-based state / Minimal intrusion principle / Military service, duty.

Headnotes:

In a democratic State based on the **rule of law**, which is conceived of first and foremost as a substantive law-based State, statutory provisions cannot be applied in a manner which conflicts with any of the fundamental constitutional principles. The duty of courts to ascertain the law is not merely a search for direct, concrete and explicit orders in the statutory text, but also the duty to ascertain and formulate what is the specific legal requirement where the interpretation of abstract norms is concerned. The leeway for such interpretation and its significance are greater in relation to enactments which, while not entirely appropriate, are not unconstitutional. In each case, from among many conceivable interpretations of a statutory provision, only as interpretation which respects constitutional principles may be applied (if such interpretation is possible) and statutory provisions may only be annulled as unconstitutional if the provision at issue cannot be applied without violating constitutionality (the principle of minimal intrusion).

The decision to refuse to perform military service on the grounds of conscience should be due to fundamental objections, not a mere distaste for meeting civic obligations. The Charter of Fundamental Rights and Basic Freedoms requires that there be a conflict with one's own conscience or religious convictions.

Summary:

This case of concrete norm control initiated by a criminal senate of the Supreme Court, which had before it the case of conscientious objectors to military service who had been twice convicted, under §§ 269, 270 of the Criminal Act, of refusing to perform military service. In view of the Constitutional Court's constant jurisprudence on these provisions, to the effect that to convict a person more than once under §§ 269, 270 for his permanent refusal to perform military service constitutes a violation of the principle *ne bis in idem*, the

Supreme Court considered §§ 269, 270 to be unconstitutional when considered in conjunction with § 22.1 of the Military Service Act, since the former required something inconsistent with the latter. § 22.1 places a duty upon the Ministry of Defence to continue calling up a person until he has performed military service, and a conviction under §§ 269, 270 is not one of the statutorily-defined circumstances justifying discharge from the duty of military service. In the view of the Supreme Court, § 22.1 of the Military Service Act and §§ 269, 270 of the Criminal Act are unconstitutional because they contain conflicting requirements, one laying down a significant duty, the other not providing for its enforceability.

The principle of minimal intrusion applies above all in relation to §§ 269, 270 of the Criminal Act, which provide for criminal sanctions for the refusal to perform military service. As far as the right to refuse to perform military service is concerned, the Constitutional Court views it as its duty to stress that this right is constitutionally bound up with the fulfilment of the conditions laid down in Article 15.3 of the Charter of Fundamental Rights and Basic Freedoms and that all courts must, therefore, understand it as a special rule under the freedom of conscience, one of the basic constitutional freedoms. Similar legal provisions are also found in other European States where this right is firmly bound up solely with the principle of freedom of conscience. Only when the performance of military service credibly comes into conflict of principled moral character with a person's own conscience can the intensity of this internal conflict form the foundation for the protection of an individual constitutional right to the freedom of conscience against a statutorily prescribed duty. Under these circumstances, Article 15.3 of the Charter of Fundamental Rights and Basic Freedom prevents the State from compelling the performance of military service, unless exceptional circumstances exist.

The current regulation governing a person's refusal to perform military service reflects the requirements of Article 15.3 of the Charter in a rather watered down form. In particular, in the Act on Civilian Service, the requirement that the service be in conflict with one's conscience or religious conviction is simply "covered" by a personal declaration made by the affected person [i.e., the affected person need not demonstrate genuine objections of conscience]. However, § 269 of the Criminal Act once again underlines the subjective aspect of the criminal offence, for an acceptable construction of this provision yields two components: the intent not to report for military service and the personal manifestation evidencing the permanence of this intention.

The Constitutional Court decided that, in spite of its reservations concerning the provisions in question, they are not unconstitutional. While both provisions do not exclude an interpretation that would bring them into conflict, they do not require that State authorities act in a conflicting way. The duty to interpret in conformity with the Constitution should assist in avoiding any such conflict. *Ne bis in idem* constitutes one of the fundamental constitutional principles in conformity with which statutes must be interpreted. While this duty applies mainly to courts, it also applies to § 22 of the Military Service Act, and should encourage the military to find another way to carry out its duties than conscripting a person who has already been convicted, thus needlessly bringing on the expense of pointless litigation.

Languages:

Czech.

CZE-1998-3-013

22-09-1998 | Pl. 1/98 | US | The Principle of Equality in the Area of Restitution Policy

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 22-09-1998 / **e)** Pl. US 1/98 / **f)** The Principle of Equality in the Area of Restitution Policy / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
5.2.2 **Fundamental Rights** - Equality - Criteria of distinction.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Restitution in relation to privatisation / Compensation.

Headnotes:

In view of the fact that the communist regime suppressed civil and human rights over a long period, the moral condemnation of the «old regime» may not be joined with an absolute elimination of, and full compensation for, all injustices caused in that period. Both for the State and for society, that would be a task «*ultra vires*» - beyond their powers. The modern State based on the **rule of law** is not founded on the principle «*fiat iustitia, pereat mundus*». It may be generally stated that the principle of the State based on the **rule of law** demands an assessment of the proportionality of the scale and range of particular State measures in relation to the degree of urgency which leads the State to such interventions. Hence, the policy of restitution of property was based on the principle not of removing all injustices which occurred but of mitigating them. This policy must not lead to interventions in private law relations that would do further injustices.

Summary:

Certain claimants to restitution became entitled to a restitution claim only three years after the original Restitution Act was adopted, as a result of the Parliament adopting an amendment to that act to widen the circle of entitled persons. Considering the passage of a considerable period of time since the adoption of the original Act and in order not to cause uncertainty in the field of privatisation, the amending Act provided, in addition, that the claimant was only entitled to compensation and not to the return of the actual property if, prior to the entry into effect of the amending act, that property had been included in a privatisation project or a decision on its privatisation had been taken.

As a consequence of this provision, the claimants' requests for restitution were denied by an ordinary court. They submitted a constitutional complaint against the decision and, in conjunction therewith, submitted a petition proposing the annulment of the amending act, which they asserted violated the principle of equality. The Court rejected this petition and upheld the constitutionality of the amending Act.

The Court pointed out that the property covered by the amending Act had already been able to be freely disposed of, so that there was concern when adopting the amending Act that further property injustices were not committed against those who took such property through privatisation or others who had legally acquired it since that time. Consequently, the claimant was not entitled to receive back the actual property but only financial compensation.

Supplementary information:

Two judges delivered dissenting judgments in this case.

Languages:

Czech.

CZE-1997-3-011 20-11-1997 IV. US 205/97 Authoritarian State Pressure as Grounds for Excusing Failure to Perform a Required Legal Transaction

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 20-11-1997 / **e)** IV. US 205/97 / **f)** Authoritarian State Pressure as Grounds for Excusing Failure to Perform a Required Legal Transaction / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

3.13 **General Principles** - Legality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.39.1 **Fundamental Rights** - Civil and political rights - Right to property - Expropriation.

Keywords of the alphabetical index:

Political pressure / Precedent case, improper application / Regime, communist, character, legal consequence / Property, restitution / Succession, right / Court decision, effects.

Headnotes:

Political coercion is not a single act, rather an ongoing process, in consequence of which individuals in socialist states performed legal transactions in relation to their property which they would undoubtedly not have performed had they been in a State based on the **rule of law**. If State conduct was the reason why a person was unable to receive property he was entitled to inherit, then he qualifies for the return of the property under restitution, and if he is now dead, his heir qualifies for the property in his place.

The mere repetition of a published court decision and the application of its reasoning to an inapposite case, which resulted in the court's failure to ascertain the circumstances which are relevant for judgment in the matter under consideration, constitute a violation of the right to judicial protection under Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms.

Summary:

This constitutional complaint was part of an ongoing dispute in which a Czech citizen of German ethnic origin claimed that he was eligible under the restitution laws, in particular Act no. 87/1991 Sb., for the return of property confiscated under the Benes Decree no. 108/1945 Sb. In 1995, the ordinary courts decided that the restitution laws apply only to property confiscated after the communist seizure of power on 25 February 1948. Since the property in question was confiscated by Decree no. 108, which came into effect on 30 October 1945, such property did not qualify for restitution. Arguing that the property was not actually confiscated under that Decree in 1945, but rather by the communist government after 1948, the complainant insisted that the property was subject to restitution. In 1995 the Constitutional Court annulled the ordinary court's decision, holding that it had failed to determine who owned the property in 1945 and whether it had actually and properly been confiscated under Decree no. 108.

In subsequent proceedings, the ordinary courts determined that the person from whom the property was allegedly confiscated had actually died on 7 October 1945, before the entry into force of Decree no. 108/1945 on 30 October 1945. That person never actually owned it but was the preferred heir to receive the property. As a consequence of her death, the father of the complainant in this case became one of the substitute heirs. However, since he did not submit a probate application, he could not be entitled to restitution under Act no. 87/1991, and his son is therefore not entitled in his place. The courts cited a published court decision holding that a substitute heir who did not receive his inheritance due to political pressure had a restitution claim, but that the children or grandchildren of that substitute heir did not.

The Constitutional Court held that the complainant's father had not submitted a probate application in 1945 because there was no probate proceeding and it had been the duty of a court to initiate a probate proceeding. Consequently, the ordinary court failed to take into account the relevant differences between this case and the case they cited, differences which made that case distinguishable from this one. As a consequence, the complainant had been denied his right to judicial protection by the lower court's failure to determine that he is entitled under Act no. 87/1991 Sb. to the return of the property.

Cross-references:

In 1995 the Constitutional Court held proceedings in the same matter which resulted in judgment Pl. ÚS 14/94, reported in the *Court's Collection* at Vol. 3, no. 14 and reported in the *Bulletin* 1995/2 [CZE-1995-2-005], and judgment IV. ÚS 56/94 of 22 June 1995, reported in the *Court's Collection* at Vol. 3, no. 36 and reported in the *Bulletin* 1995/2 [CZE-1995-2-009].

Languages:

Czech.

CZE-1996-3-010 15-10-1996 IV. US 275/96 Interpretation of statutes affecting constitutional rights

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 15-10-1996 / **e)** IV. US 275/96 / **f)** Interpretation of statutes affecting constitutional rights / **g)** / **h)** CODICES (Czech, English).

Keywords of the Systematic Thesaurus:

2.2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution - Hierarchy attributed to rights and freedoms.
2.3.9 **Sources of Constitutional Law** - Techniques of review - Teleological interpretation.
3.3 **General Principles** - Democracy.
3.3.3 **General Principles** - Democracy - Pluralist democracy.
4.9.7.3 **Institutions** - Elections and instruments of direct democracy - Preliminary procedures - Registration of parties and candidates.
5.1.1.1 **Fundamental Rights** - General questions - Entitlement to rights - Nationals.
5.3.41.2 **Fundamental Rights** - Civil and political rights - Electoral rights - Right to stand for election.

Keywords of the alphabetical index:

Election, candidate, requirements.

Headnotes:

The basic interpretation guideline for laws which regulate the exercise of political rights in greater detail is Article 22 of the Charter of Fundamental Rights and Basic Freedoms from which it ensues that anybody applying law is obliged to construe and use provisions of law so as to enable and protect the political pluralism in a democratic society.

This principle demands that disputed provisions of the Act on Election be construed and used in favour of the purpose and meaning of the law. The purpose and meaning of the law, at the same time, cannot be found in words and sentences contained in a legal regulation only; principles recognised by democratic States governed by the **rule of law** must also be considered. The Czech Republic claims to be such a State in Article 1 of the Constitution.

If, therefore, the purpose of the Act on Election to the Parliament of the Czech Republic is to implement and more closely define the fundamental political right to elect and be elected, than the disputed provisions must be construed in favour of this right, viz., that a citizen be, if possible, enabled to elect and be elected. This opinion is also supported in Article 4.4 of the Charter of Fundamental Rights and Basic Freedoms, according to which, in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved.

Summary:

The District Election Committee and, on appeal the Central Election Committee and the Supreme Court refused to register PhDr. J. as an independent candidate during the elections to the Senate of the Parliament of the Czech Republic on the grounds that he did not provide proof of his Czech citizenship, which is the basic prerequisite for the exercise of the right to be elected, in time.

All the aforementioned bodies presumed that although an identification card is a sufficient proof of Czech citizenship under the Act on Acquisition and Loss of Czech Citizenship, it is insufficient for the purpose of candidates' registration for the Senate in accordance with the Act on Election. The Act on Election does not contain any special provision in this respect, because the clerk of the election committee is not authorised to receive an identification card, which exists only as an original and a copy of which cannot be officially verified, in accordance with laws concerning identification cards, verification of copies or transcripts and the genuineness of signatures.

The Constitutional Court concluded that both the election committee and the Supreme Court, as bodies applying law, raised aspects of suitability and practicality over law, and in particular, over constitutional principles, and construed the incompatibility of laws to the detriment of the person exercising his constitutional rights.

In the opinion of the Constitutional Court, the identification document which the candidate presented to the election committee, is a sufficient proof of citizenship. In addition to this, the candidate did present the requested certificate of citizenship, albeit after the lapse of time period for registration set by law. For these reasons, the Constitutional Court has annulled all three contested decisions. As a result of this measure, the appropriate election committee registered the candidate.

Languages:

Czech.

GER-2004-1-002

03-03-2004 1 BvR 2378/98, 1 BvR 1084/99

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 03-03-2004 / **e)** 1 BvR 2378/98, 1 BvR 1084/99 / **f)** / **g)** *Bundesgesetzblatt* I 2004, 470 / **h)** *Neue Juristische Wochenschrift*, 2004, 999-1022; CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.3 **Constitutional Justice** - Jurisdiction - The subject of review - Constitution.
3.16 **General Principles** - Proportionality.
5.1 **Fundamental Rights** - General questions.
5.3.13.1.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Criminal proceedings.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.
5.3.24 **Fundamental Rights** - Civil and political rights - Right to information.
5.3.32.1 **Fundamental Rights** - Civil and political rights - Right to private life - Protection of personal data.
5.3.35 **Fundamental Rights** - Civil and political rights - Inviolability of the home.

Keywords of the alphabetical index:

Residence, acoustic monitoring / Evidence, exclusion / Communication, eavesdropping, electronic / Data, destruction / Data, collection.

Headnotes:

1. Article 13.3 of the Basic Law in the version of the Act to Amend the Basic Law (Article 13) of 26 March 1998 is in conformity with Article 79.3 of the Basic Law.

2. The inviolability of human dignity pursuant to Article 1.1 of the Basic Law includes the recognition of absolute protection of an individual's inner private sphere. The acoustic monitoring of residential premises for the purpose of criminal prosecution (Article 13.3 of the Basic Law) is not permitted to intrude in this area. To this extent, there is no need to weigh the inviolability of the home (Article 13.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) and the interest in the prosecution of crime in accordance with the proportionality principle.

3. Not every acoustic monitoring of residential premises violates the human dignity aspect of Article 13.1 of the Basic Law.

4. Statutory authority to monitor residential premises must guarantee the inviolability of human dignity and satisfy the constituent elements of Article 13.3 of the Basic Law as well as other constitutional requirements.

5. If the acoustic monitoring of residential premises based on such authority nevertheless leads to the collection of information derived from the individual's inner private sphere which enjoys absolute protection, the monitoring must cease immediately and recordings must be deleted; no exploitation of such information is permitted.

6. The provisions in the Code of Criminal Procedure for the implementation of acoustic monitoring of residential premises for the purpose of criminal prosecution do not entirely satisfy the constitutional requirements regarding the protection of human dignity (Article 1.1 of the Basic Law), the proportionality principle incorporated in the principle of a state governed by the **rule of law**, the guarantee of effective legal protection (Article 19.4 of the Basic Law) and the right to a hearing in court (Article 103.1 of the Basic Law).

Summary:

I. As the result of an amendment to the Basic Law in 1998, Article 13 of the Basic Law - the fundamental right to the inviolability of the home - was amended by the addition of paragraphs 3 to 6. The previous paragraph 3 became paragraph 7 of Article 13 of the Basic Law. In passing the amendment, the legislature was primarily seeking a way to combat organised crime. Pursuant to Article 13.3 of the Basic Law acoustic monitoring of residential premises for the purposes of criminal prosecution is now permitted. For the operation of Article 13 it is necessary that specific facts lead to the assumption that someone has committed one of a number of explicitly listed grave crimes, that that person is probably at the private premises and investigation of the facts by other means would be unproportionally obstructed or without chance of success. Article 13.3 of the Basic Law was implemented in an ordinary law, namely the Act to Improve the Suppression of Organised Crime. The main provision is § 100.c.1.3 of the Code of Criminal Procedure. According to that provision, it is permissible to eavesdrop on and record the words of an accused spoken in private if certain facts justify the suspicion that he or she has committed one of a number of listed offences ("catalogue offences").

The power to order eavesdropping measures lies with the State Protection Division of the Regional Court and in cases of imminent danger, with the Division's president. Other provisions regulate, *inter alia*, bans on the taking of evidence, the exclusion of evidence improperly obtained and duties to inform the person concerned. The use of the collected data is also now permitted in other contexts. In particular, the complainants argue that their fundamental rights under Article 1.1 of the Basic Law (inviolability of human dignity), Article 1.3 of the Basic Law (binding effect of the fundamental rights on state authorities) and Article 13.1 of the Basic Law in conjunction with Article 19.2 of the Basic Law (ban on the violation of the essence of a fundamental right), Article 79.3 of the Basic Law (impermissibility of amendments of the fundamental rights), Article 19.4 (effective legal protection) and Article 103.1 of the Basic Law (right to a hearing in court) have been violated.

II. The First Panel allowed the constitutional complaints in part to the extent that they were admissible.

The Court's reasoning was essentially as follows. Article 13.3 of the Basic Law, which allows the legislature to authorise the monitoring of residential premises for the purposes of criminal prosecution, is in conformity with Article 79.3 of the Basic Law. Article 79.3 of the Basic Law only forbids constitutional amendments which affect the principles laid down in Articles 1 and 20 of the Basic Law. These include the requirement that human dignity be respected and protected (Article 1.1 of the Basic Law).

However, the statutory authorisation to carry out the acoustic monitoring of residential premises based on Article 13.3 of the Basic Law (§ 100.c.1.3, § 100.2 and 100.3 of the Code of Criminal Procedure) and other related provisions are unconstitutional in significant respects. The legislature, for instance, did not sufficiently define the constitutionally necessary bans on monitoring and the collection of evidence in § 100.d.3 of the Code of Criminal Procedure by taking into account the inner private sphere of the individual. Monitoring must be impermissible if the accused is at home alone with very close family members or other persons very close to him or her and if there are no reasons to suspect that they were involved in the accused's offence. There are also insufficient statutory precautions to ensure that monitoring is ceased if the situation suddenly changes so that the inviolable private sphere is affected. In addition, a prohibition on the use of information improperly obtained and a requirement that information improperly obtained be immediately destroyed are missing. Moreover, there needs to be a guarantee that information from the inviolable private sphere is not used in main proceedings or used as a basis for further investigations. Pursuant to Article 13.3 of the Basic Law, monitoring may only be considered during the investigation of grave offences individually listed in the statute. Some of the so-called catalogue crimes to which reference is made in § 100.c.1.3 of the Code of Criminal Procedure do not fulfil these requirements. Thus, they do not qualify as grounds for monitoring residential premises.

The fundamental right to the inviolability of the home must also be protected under procedural law, in particular through the involvement of a judge (§ 100.d.2, 100.d.4.1 and 100.d.4.2 of the Code of Criminal Procedure). The Panel defined more closely the prerequisites for a court order's content and written substantiation. Thus, the order must specify the type of measure as well as its scope and duration. The public prosecutor's office and the responsible court must examine a case carefully and give detailed reasons if they wish to have the duration of the monitoring period originally fixed extended; such extension is in principle possible. Court involvement is also necessary in order to ensure that the prohibition on using evidence improperly obtained is respected.

The provisions on the duty to notify the persons affected (§ 101 of the Code of Criminal Procedure) are only in part compatible with the Basic Law. The subjects of fundamental rights have in principle a right to be informed about measures for monitoring residential premises. In addition to the accused, the owner and occupants of a home in which monitoring measures have been taken are to be informed. This also applies to third parties who are affected, unless enquiries into their names and addresses would further intervene in their right to privacy. The reasons listed in § 101.1.1 of the Code of Criminal Procedure for allowing the notification of the parties to be deferred in exceptional circumstances are only partly in conformity with the Basic Law. The threat posed to public security, which is only referred to in a general manner, or to the possibility of later operations by an undercover officer are not sufficient. The right to a hearing in court (Article 103.1 of the Basic Law) will also be violated if after the commencement of public proceedings a court defers notification with the result that it becomes aware of facts to which the accused is not privy.

The provisions regarding the use of personal information in other proceedings (§ 100.d.5.2 and § 100.f.1 of the Code of Criminal Procedure) are largely in conformity with the Basic Law. However, it is only permissible to use information to solve other similarly important "catalogue crimes" and to eliminate threats, in individual cases, to highly important legal interests. The purpose of use must be compatible with the original purpose of the monitoring. The non-existence of a duty to state how the information was obtained is a violation of the constitution.

The provisions concerning the destruction of data (§ 100.d.4.3, § 100.b.6 of the Code of Criminal Procedure) are not in conformity with Article 19.4 of the Basic Law. The legislature failed to balance the interests in the destruction of data and the guarantee of effective legal protection with the monitoring of residential premises. To the extent that data must still be available for examination by the court, it may not be destroyed. However,

access to it must be blocked. The information may also not be used for any other purpose than the information of the person concerned and for judicial review.

III. Two members of the Panel have attached a dissenting opinion to the decision. In their opinion Article 13.3 of the Basic Law is not in conformity with the Basic Law and therefore void. They advocate a strict and narrow interpretation of Article 79.3 of the Basic Law. The issue in an age in which people seem to have become accustomed to unlimited technical possibilities and in which even a person's privacy within his or her own four walls is no longer a taboo that can deter the [state's] security needs is not simply to stop the beginning of a dismantling of fundamental rights positions guaranteed by the constitution. Instead, the issue is to prevent such development from reaching a bitter end, i.e. a situation in which the concept of the individual that has been generated by such development is no longer reconcilable with the values in a free democratic state governed by the rule of law.

Languages:

German.

GER-2004-1-001 05-02-2004 2 BvR 2029/01

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 05-02-2004 / **e)** 2 BvR 2029/01 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift*, 2004, 739-750; *Europäische Grundrechte Zeitschrift*, 2004, 73-89; CODICES (German).

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
3.14 **General Principles** - *Nullum crimen, nulla poena sine lege*.
3.16 **General Principles** - Proportionality.
3.18 **General Principles** - General interest.
5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
5.3.5.1.2 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Non-penal measures.
5.3.15 **Fundamental Rights** - Civil and political rights - Rights of victims of crime.
5.3.38.1 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Criminal law.

Keywords of the alphabetical index:

Detention, preventive / Criminal, dangerous / Dangerousness, prognosis / Resocialisation, principle / Imprisonment, conditions / Detention, enforcement / Criminal, violent / Guilt, principle.

Headnotes:

1.a. A person's human dignity will not be violated even by long lasting placement in preventive detention if this is necessary because of his or her continued dangerousness. However, it is also necessary in these cases to respect the autonomy of the detainee and honour and protect his or her dignity. Therefore, the aim of preventive detention like the aim of penal detention must be to lay the foundations for a responsible life in freedom.

b. Article 1.1 of the Basic Law does not impose on the institution of preventive detention a constitutional requirement that there be a fixed maximum period for the detention at the time it is imposed or at a later time when it is re-examined. It is not objectionable for the legislature to provide that it is not necessary at the commencement of preventive detention for a binding decision to be made on the expected time of the

detainee's release.

2.a. The longer the placement in preventive detention lasts, the stricter the conditions governing its continuation.

b. The provision in § 67.d.3 of the Criminal Code takes into account the increased importance of the right to freedom after ten years in custody by allowing higher demands to be placed on the threatened legal interest and the proof of the detainee's dangerousness and by only allowing the continuation of detention in exceptional cases.

c. Due to the special significance that the relaxation of detention conditions has for the prognosis of future dangerousness, the court responsible for enforcing the sentence is not permitted to accept without sufficient reason a refusal by prison authorities to relax detention conditions which could prepare the way for the end of the preventive detention measure.

d. The judicial administrations in the *Länder* (states) have to ensure that a detainee is able to have his or her preventive detention conditions improved to the full extent that is compatible with prison requirements.

3. The area of application of Article 103.2 of the Basic Law is restricted to state measures which express sovereign disapproval of illegal and culpable conduct and thus impose suitable and appropriate punishment on it.

4. The abolition of the maximum period of detention where preventive detention is ordered for the first time and the application of the same to criminals who had been placed in preventive detention prior to the pronouncement and coming into force of the new provision and who had not yet finished their sentences is in conformity with the protection of public confidence guaranteed in a state governed by the **rule of law** (Article 2.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law).

Summary:

I. The complainant had numerous previous convictions for serious criminal offences and had only been free for a few months since the age of 15. Most recently he had been sentenced in 1986 to a prison sentence of five years for attempted murder in connection with robbery. At the same time his (subsequent) placement in preventive detention was ordered. According to the provision in force at this time, a person's first placement in preventive detention could not exceed ten years (§ 67.d.1 of the Criminal Code). This provision was amended in 1998 to the effect that a term of preventive detention would only be considered to have expired within this period of time if there was no danger that the offender would commit other serious crimes (§ 67.d.3 of the Criminal Code). At the time the new provision came into force, the complainant was being held in preventive detention and if it had not been for the new provision he would have had to have been released at the expiration of the ten years. The Penal Execution Division of the responsible court (*Strafvollstreckungskammer*) refused to declare that the complainant had completed his term in preventive detention in 2001.

His appeals were unsuccessful. Therefore, the complainant lodged this constitutional complaint. The complainant alleges, in particular, that the new provision violates the prohibition of retroactivity in Article 103.2 of the Basic Law. According to that article, an act can only be punished where it constituted a criminal offence under the law before the act was committed.

II. The Second Panel rejected the constitutional complaint as unfounded. The Court's reasoning was as follows:

The placement of a person in preventive detention without there being a statutory maximum time limit for detention does not violate the guarantee of human dignity. A person's human dignity will also not be violated by long lasting placement in preventive detention if this is necessary because of his or her continued dangerousness. An individual's connection and involvement with the community which is provided for in the Basic Law justify the adoption of indispensable measures to protect essential public interests against

damage. Nothing prevents a polity from safeguarding itself against dangerous criminals by placing them in detention. However, it is also necessary in these cases to respect the autonomy of the detainee and honour and protect his or her dignity. Therefore, the aim of preventive detention like the aim of penal detention must be to lay the foundations for a responsible life in freedom.

The current form of preventive detention satisfies this standard. The constitutional protection of human dignity does not require that a binding decision be made on the expected time of release at the time when preventive detention is ordered due to a person's continued dangerousness or at a later time when the detention is re-examined. This is because a future danger can only be estimated in the present. How long a danger will continue to exist will depend on future developments which cannot be predicted with certainty. At every stage of preventive detention, the question of whether the person concerned can be freed is considered. The fact that the authorities repeatedly examine whether preventive detention should be suspended or terminated also guarantees the person concerned adequate legal certainty under the law of procedure.

The legal and practical purpose of preventive detention is reintegration into society. This imprisonment goal and the obligation to counteract potential damage caused by detention also apply to detainees in preventive detention. Thus, according to the Prison Act in addition to the general privileges available during preventive detention special privileges should contribute to the detainee's leading a purposeful life. According to information from the governments of the *Länder*, preventive detention is not in practice purely a matter of holding dangerous criminals in custody.

There is also no violation of the fundamental right of freedom of the person under sentence 2 of Article 2.2 of the Basic Law. If one takes into account the following considerations preventive detention is a restriction of fundamental rights in conformity with the Basic Law. It is true that the possibility of lifelong preventive detention constitutes a serious encroachment upon fundamental rights. However, such possibility does not violate the guarantee of the essence of fundamental rights because the new provision only allows the continued preventive detention at the expiration of ten years, if it serves to prevent serious damage to the mental or physical integrity of potential victims.

The new provision satisfies the requirements of the principle of proportionality. The Federal Constitutional Court is only to a limited extent able to examine the exercise of the legislature's discretion in deciding whether detention is necessary and choosing suitable means for it. The same applies to the legislature's assessment and prognosis regarding a detainee's dangerousness that is necessary in this context. The uncertainties associated with placement in preventive detention affect the minimum requirements imposed on the prognosis and its evaluation in connection with the prohibition of excessiveness. However, such uncertainties do not eliminate the requirement for encroachments on freedom to be suitable and necessary. The detention must remain reasonable in order to avoid an excessive burden. The fundamental right to freedom of the person concerned must be safeguarded at the procedural and substantive levels. The legislature satisfies these substantive requirements of the prohibition of excessiveness by making the requirements which have to be satisfied for preventive detention to be continued at the expiration of ten years far more stringent than the original requirements. As a result, a continuation is limited to serious sexual offenders and violent criminals. In addition, there is a statutory presumption that dangerousness will generally no longer exist at the expiration of ten years. Continuation of the preventive detention beyond this time limit can only be considered the *ultima ratio* in the case of those persons whose assumed safeness has been clearly rebutted. From the point of view of the law of procedure, the requirements of the prohibition of excessiveness are also satisfied. The legislature has created a system for regularly examining whether a detainee's sentence should be suspended or terminated and the requirements for carefully defining the foundations of the prognosis. In applying these provisions, judges must, however, satisfy certain standards of diligence in order to conform to the prohibition of excessiveness. In particular, the decision to continue preventive detention must be based on an expert opinion which justifies the decision's exceptionalness. Repeated, routine evaluations must be avoided. Therefore, judges must carefully choose and check experts. These checks must cover the prognosis results and the quality of the entire prognosis procedure. In addition to being transparent the psychiatric prognosis must have a sufficiently wide prognosis basis. The relaxation of detention conditions has special significance for the basis of the prognosis. Therefore, the court responsible for enforcing the sentence is not permitted to accept without sufficient reason a refusal by prison authorities to relax detention conditions which could prepare the way for the end of the preventive detention. Ultimately, the special character of preventive

detention must also be taken into account within the framework of measures of correction and prevention (other than punishment). Solid reasons do justify a partial concordance between preventive detention and the punishment. Nevertheless, the state's justice administrations must make use of their statutory possibilities for allowing a detainee improvements in his or her detention conditions to the extent that such improvements are compatible with prison needs.

The total prohibition of retroactivity in Article 103.2 of the Basic Law is not violated. The prohibition does not extend to the measures of correction and prevention in the Criminal Code. The area of application of the total prohibition of retroactivity is limited to state measures which express sovereign disapproval of illegal and culpable conduct and thus impose suitable and appropriate punishment on it. The total prohibition of retroactivity in Article 103.2 of the Basic Law is anchored in the guarantee of human dignity and the principle of guilt. An accusation of criminal guilt presupposes that the standard for deciding whether or not such guilt exists has already been determined by statute. Only persons who are aware of such standard and can adapt their conduct to its legal consequences can act responsibly. Citizens should clearly recognise the spectrum of human behaviour outside the realm covered by criminal law in order to be able to behave accordingly. Preventive detention does not serve this legislative goal. In contrast to imprisonment, it is not associated with either disapproval of reprehensible conduct nor does it aim to punish criminal guilt. Instead it is aimed exclusively at the prevention of future criminal offences.

The new provision is also compatible with the protection of public confidence in a state governed by the rule of law pursuant to Article 2.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law. It has a permissible retroactive connection to the offence. The reliability of the legal system is a fundamental prerequisite of a free constitution. Therefore, special justification is needed if the legislature wishes to subsequently amend to the detriment of the persons concerned the legal consequences of conduct which occurred in the past.

The new provision's connection with the past is evident from the fact that it also applies to cases where preventive detention was ordered for the first time prior to its pronouncement. The abolition of the maximum period of detention does not, however, extend back to a point in time prior to the coming into force of the new provision and does not modify any past events. This is because a preventive detention order did not depend even under old law on the circumstances existing at the time of the original offence, but rather on the circumstances prevailing at the time of sentencing. Similarly, the new provision does not change the legal consequences of a final criminal sentence to the person concerned's detriment. The ten-year time limit was not an integral part of the criminal sentence passed under the old law i.e. it was not final and absolute. The new provision only covers persons who were still in preventive detention at the time it came into force. In the case of these persons, the coming into effect of the newly regulated legal consequences also depends on circumstances which only occurred later and, in particular, the person's conduct during imprisonment. A decision on the end of preventive detention thus depends on events which had not occurred at either the time the offence was committed or the sentence was passed or the entry into force of the new provision.

Languages:

German.

GER-2003-3-020

02-07-2003 2 BvR 273/03

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 02-07-2003 / **e)** 2 BvR 273/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

Keywords of the alphabetical index:

Statute barred for want of prosecution / Penalty, mitigation / Administrative offence, proceedings, duration.

Headnotes:

Article 2.1 of the Basic Law, in conjunction with the principle of the **rule of law**, guarantees an accused in proceedings dealing with an administrative offence, just as it guarantees an accused in criminal proceedings, the right to a fair trial and due process. The latter right includes the right to have the proceedings completed within a reasonable time.

In a case where the duration of proceedings is excessive and not in accordance with the principle of the **rule of law**, the principle of proportionality entails the obligation to review carefully whether and, if so, with which means the state may (still) prosecute the person concerned for the administrative offence.

Such principles are also applicable where the delay in proceedings only occurs at the appellate level (i.e. where there is an appeal from proceedings concerning an administrative offence).

Summary:

I. The complainant was fined DM 4,000 for an administrative offence by a Local Court *(Amtsgericht*) in 1998. The complainant promptly appealed on a point of law giving his reasons. In addition to raising specific objections, he pleaded that the Local Court had erred on the facts. In July of 1998 the chief public prosecutor's office *(Generalstaatsanwaltschaft)* gave its comments on the complainant's plea. In an order dated 15 January 2003, the Higher Regional Court *(Oberlandesgericht)* dismissed the complaint as inadmissible "because the re-examination of the case on the basis of the reasons given in the appeal did not show any serious legal errors that disadvantaged the person concerned". The Higher Regional Court also stated that the prosecution of the offence was not barred by the statute of limitations because the running of the period of limitation had been suspended since the delivery of the impugned judgment (see § 32.2 of the Administrative Offences Act, *Ordnungswidrigkeitengesetz*, OWiG).

In a constitutional complaint, the complainant alleged a violation of his fundamental right to effective legal protection. He claimed that the Higher Regional Court had taken four and a half years to make an order stating brief reasons on the basis of the file before it and that it had, therefore, not concluded the complaint proceedings within a reasonable time-limit. He further alleged that the offence had occurred in August 1994. According to the law in effect at the time, the limitation period was two years. The decision by the Higher Regional Court had taken longer than four times the normal limitation period and more than twice as long as the maximum limitation period.

The Ministry of Justice in Baden-Württemberg indicated in its comments on the matter that its judges had been at the time primarily occupied with criminal matters, which took precedence. Therefore, in individual cases, other proceedings had to wait. The Ministry of Justice claimed that the sole judge hearing the case had made it clear to the complainant's defence lawyers in a telephone call in the middle of 2002 that the panel was overburdened, but that the proceedings would not be discontinued on the basis that they were statute-barred for want of prosecution.

II. The Second Chamber of the First Panel found the constitutional complaint well-founded. It overturned the impugned decision and referred the matter for retrial to the Higher Regional Court. The Federal Constitutional Court gave the following reasons.

Article 2.1 of the Basic Law, in conjunction with the principle of the rule of law, guarantees an accused in proceedings concerning an administrative offence the right to a fair trial, which includes the right to have the proceedings completed within a reasonable time. Whether the duration of the proceedings is still reasonable

must be assessed according to the circumstances of the individual case. Factors that are generally significant are, in particular, an extension of the length of proceedings due to court delays, the entire length of the proceedings, the seriousness of the alleged offence, the scope and difficulty of the subject-matter of the proceedings as well as the degree to which the accused is especially burdened due to the length of the proceedings. The severity of the applicable measure is, however, eased in the case of administrative offences by the fact that the penalty is simply intended as a sharp reminder of a person's obligations and does not have the intensity of state intervention in the form of criminal punishment. It seems reasonable to assume that the duration of proceedings is too long if the duration is several times the normal limitation period.

Even in proceedings concerning an administrative offence, every avoidable delay can expose the person concerned to additional burdens. With an increasing delay in the proceedings, these burdens conflict with the principle that lays down that punishment must be proportionate and in just proportion to the perpetrator's guilt. That principle is derived from the principle of the rule of law. Therefore, a delay in proceedings in violation of the principle of a state governed by the rule of law can also have effects on the size of the fine and even lead, in extreme cases, to the discontinuation of proceedings (see § 47.2 of the Administrative Offences Act). In a case where the duration of proceedings is excessive and not in accordance with the principle of the rule of law, the principle of proportionality entails the obligation to review carefully whether and, if so, with which means the state may (still) prosecute the person concerned. It is generally necessary to find expressly that the nature and scope of the requirement of reasonable time has been violated and to define more clearly the extent to which this has to be taken into account.

Where the judiciary is responsible for significant and avoidable delays that first occur at the appellate level, the question still arises as to whether the judgment is compatible with the principle of proportionality. Even delays that occur for the first time at the appellate level can be a burden on the complainant. After all, a judgment against the accused - even if it is not *res iudicata* - still exists and its lawfulness remains unclear over a longer period of time. Thus, the accused is perceivably burdened.

In the case at instance, the conduct of the proceedings for an administrative offence had been subjected to considerable delay. The Higher Regional Court, whose task in the case in question had been merely to decide on the existence of errors of law (see § 79.3 sentence 1 of the Administrative Offences Act and § 337 of the Code of Criminal Procedure, *Strafprozessordnung*, StPO), did not make an order for over four and a half years even though there was no indication that the appeal contained particularly difficult questions of law. The reference by the Ministry of Justice in Baden-Württemberg to the difficult personnel situation - regardless of the fact that it did not deal specifically with the burden experienced by the actual court hearing the case or the organisational measures taken to rectify the problems - could not justify the proceedings lasting so long, since the state community bears full responsibility where proceedings cannot be concluded within a reasonable time due to a lack of personnel.

It did not follow from that that the proceedings should have been discontinued. The Higher Regional Court should have examined whether and, if so, to what extent its own delay in the proceedings, which had been in violation of the principles of a state governed by the rule of law, led to the disproportionality of the judgment by the Local Court and thus to the requirement to reduce the fine. It had failed to do so and instead had been satisfied by its finding that the case had not been statute barred for want of prosecution. If the Higher Regional Court were to find the judgment by the Local Court disproportionate, it would have to make a decision itself and reduce the fine (see § 79.6 of the Administrative Offences Act). Since the delay had occurred at the Higher Regional Court level, the obligation to ensure proceedings are conducted within a reasonable time prevented the case from being referred back to the Local Court.

Languages:

German.

GER-2003-2-011 25-07-2003 2 BvR 153/03

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 25-07-2003 / **e)** 2

BvR 153/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
5.3.13.1.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Criminal proceedings.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

Keywords of the alphabetical index:

Trial, within reasonable time, remedy / Penalty, criminal, mitigation.

Headnotes:

A considerable delay in the proceedings due to the fault of the prosecuting authorities violates the right of the accused to fair trial and due process, and must be taken into consideration in the enforcement of the state's right to punish. In such cases, the principle of proportionality requires, in view of the additional negative effects and burdens on the accused, a careful examination of with which means, if at all, the state may (still) take criminal action against the person affected. In particularly serious cases where a constitutional bar on the proceedings must be assumed, it is possible to consider the withdrawal of charges.

The existence of a delay that is contrary to the **rule of law** must be determined by an overall evaluation of the particular circumstances of the individual case.

Summary:

I. In its judgment of 7 June 2002, the competent Regional Court *(Landgericht)* imposed an aggregate fine of 80 daily rates of € 100 each on the complainant. The sentence had been preceded by a lengthy trial. The criminal offences had been committed in 1991 and 1992. In the course of very extensive police investigation proceedings initiated in 1993, the complainant, as a person charged with a criminal offence, was first heard in June 1995. He was served with an indictment in June 1997. In August 2000, the Regional Court opened the main hearing. A fifteen-day trial resulted in the complainant's acquittal of part of the charges and warning on the other part. The warning was issued with a suspended fine of 80 daily rates of € 500 each. On 22 August 2001, the Federal Court of Justice *(Bundesgerichtshof)* overturned the Regional Court's judgment as to the dictum and the acquittal. After a new main hearing in the Regional Court on 6 and 7 June 2002, a fine of 180 daily rates of € 100 each was imposed on the complainant for the same offences. The charges were withdrawn relating to the offences of which he had been acquitted in the first trial because the Regional Court assumed that a two-and-a-half year delay between the service of the indictment and the order opening the trial was unjustified. The Regional Court held that the prerequisites for a warning with a suspended penalty did not exist. The complainant's appeal on points of law was unsuccessful. The complainant brought a constitutional complaint challenging the excessive length of the proceedings.

II. The Third Chamber of the Second Panel granted the constitutional complaint; the essential reasoning was as follows.

The principle of the rule of law requires that criminal proceedings be brought to a close within a reasonable time. A considerable delay in the proceedings due to the fault of the prosecuting authorities violates the right of the accused to fair trial and due process. The existence of a delay that is contrary to the rule of law must be determined by an overall evaluation of the particular circumstances of the individual case. The decisive factors of the overall evaluation are:

1. the length of the delay caused by the judicial authorities;
2. the total length of the proceedings;
3. the seriousness of the offence with which the accused is charged;
4. the scope and the difficulty of the subject-matter of the case; and
5. the extent of the particular burdens that are caused to the accused by the length of the proceedings.

Delays in the proceedings that are caused by the accused are not taken into consideration. A delay that is contrary to the rule of law must be taken into consideration in the enforcement of the state's right to punish. The consequences can be the withdrawal of charges, a prohibition on prosecution, the discontinuance of proceedings, the court's dispensing with punishment, a warning with a suspended penalty and the taking into account of the circumstances in the court's assessment of punishment. In particularly serious cases where a constitutional bar on the proceedings must be assumed, it is possible to consider the withdrawal of charges.

The dictum of the complainant's sentence did not stand up to review under constitutional law. It was not apparent whether the legal consequences of the dictum were still compatible with the principle of proportional punishment in view of the considerable delay in the criminal proceedings due to the fault of the prosecuting authorities. Taken alone, the length of the proceedings, i.e. seven and a half years, was unreasonably long. It could also not be justified by invoking the scope, or the particular difficulties, of the case. In addition, there had been delays in the proceedings that could not be explained and that were solely due to the prosecuting authorities' inaction. Apart from the period between the service of the indictment and the opening of the hearing, the delays included at least one more year in which no measures whatsoever had been taken to expedite the proceedings. That point was noted in the decision.

Admittedly, the time that had elapsed because of the filing of an appeal on points of law did not, in principle, have to be added to the excessive length of proceedings. The time required for appeal proceedings is the result of an organisation of criminal proceedings that is in accordance with the rule of law. However, the longer the length of proceedings due to delays caused by the state, the greater the efforts must be on the part of the prosecuting authorities and the courts to bring the proceedings to a close as soon as possible.

Admittedly, the Regional Court had taken into account the excessive length of the proceedings caused by the fault of the judicial authorities and the particular burdens that that length had placed on the complainant. The court had imposed an aggregate fine of 180 daily rates instead of a prison sentence, which the accused would have normally incurred. That, however, did not reflect the true extent of the infringement of the principles of fair trial and due process caused by the delay in the proceedings. In determining the punishment, the Regional Court had only taken into account the period of delay of two and a half years, for which the criminal jurisdiction had been responsible. It had failed to take into account the other periods of time during which the proceedings had not been not expedited. In spite of such an infringement of the principle of proportionality, no constitutional bar on the proceedings could be assumed. Such a constitutional bar would have required the Federal Constitutional Court to withdraw the charges against the complainant. In view of the damage that had been caused by and the large number of offences that had been committed by the complainant, not all the sanctions under criminal law that could still be imposed were to be regarded as disproportionate from the outset. The Regional Court was to weigh, on the one hand the interest in criminal prosecution that existed at the relevant time against the encroachment on the complainant's rights, on the other hand. In that context, a warning with a suspended fine was not excluded in a case of excessive length of proceedings contrary to the rule of law.

Languages:

German.

GER-2003-2-009 19-08-2002 2 BvR 443/01

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 19-08-2002 / **e)** 2 BvR 443/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.7 **General Principles** - Relations between the State and bodies of a religious or ideological nature.
3.9 **General Principles** - Rule of law.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Church, self-determination / Tax, religious, rate assessment, criteria.

Headnotes:

When levying church taxes, religious bodies are bound to the order that is established by the Basic Law, in particular as to fundamental rights. Their law-making and their execution of church tax are subject to judicial review by state courts and must comply with the principles of the **rule of law**. If churches wish to avoid this commitment, they must resort to private membership fees for their funding.

Summary:

I. The plaintiff in the original proceedings, a member of the Lutheran Church of the Northern Elbe Region *(Nordelbische Evangelisch-Lutherische Kirche)* who lives in the Oldenburg church district situated in the *Land* (state) of Schleswig-Holstein, had her church tax assessed in the tax office assessment notice for the year 1994 at 9% of the income (or wage) tax payable. The plaintiff requested a decrease of the church tax on the basis of the lower tax rate of 8% that was valid at that time in Hamburg. Pursuant to the relevant provision of the church law of the Lutheran Church in force in the 1994 fiscal year, the church districts levy the church tax on the basis of a percentage rate of the income tax. In 1994, the church tax was 8% in the Free and Hanseatic City of Hamburg, whereas it was 9% of the income tax in the *Land* of Schleswig-Holstein. Since 1 January 2001, the rate of assessment of 9% has been valid in the entire territory of the Lutheran Church of the Northern Elbe Region. The plaintiff's action in the Administrative Court *(Verwaltungsgericht)* to set aside the church tax assessment notice for 1994 was unsuccessful. The Higher Administrative Court *(Oberverwaltungsgericht)*, however, allowed her action in appeal proceedings. The Federal Administrative Court *(Bundesverwaltungsgericht)* rejected the church's complaint against the denial of leave to appeal on points of law. The complainants challenged that decision by way of a constitutional complaint. They regarded the decision of the rate of assessment of church tax as an intra-church issue, which was not subject to a commitment to fundamental rights. Moreover, they put forward that the Higher Administrative Court should have submitted the church law in question to the Federal Constitutional Court for a review of its constitutionality.

II. The Second Chamber of the Second Panel did not admit the constitutional complaint for decision because it was not of fundamental importance and had no chance of success.

The Chamber's essential reasoning was as follows. The competent courts had not infringed the right to one's lawful judge (Article 100.1 of the Basic Law). The order concerning church tax, which had been issued by the synod, i.e. by the competent intra-church legislative body, fell under the autonomous statutory law of a religious body under public law. It was therefore not subject to the court's obligation to submit laws to the Federal Constitutional Court for a review of their constitutionality.

The impugned decisions did not violate the complainants' right to self-determination, as protected by Article 140 of the Basic Law, in conjunction with Article 137.3 of the Weimar Constitution (see "Supplementary information").

Pursuant to Article 140 of the Basic Law, in conjunction with Article 137.6 of the Weimar Constitution, religious bodies that are corporate bodies under public law are entitled to levy taxes on their members. The state is obliged to confer on religious bodies that have the status of corporate bodies the right to tax, which is a sovereign power. Pursuant to the Federal Constitutional Court's case-law, religious bodies are therefore bound by the order of the Basic Law, in particular by fundamental rights, if they make use of such sovereign power.

The state complies with its obligation under the Constitution if it establishes the legal prerequisites for the right to tax and, in doing so, provides for the possibility of enforced collection. In Schleswig-Holstein and Hamburg, the legislature has restricted itself to regulating the types of church tax and to establishing the basis for the grant of the authority to enact intra-church tax laws. In doing so, the state has left it to the religious bodies themselves to decide how they act within this framework. With a view to that, it is incumbent on the religious bodies, on the basis of their own responsibility, to enact intra-church tax laws and to issue orders concerning rates of assessment. In doing so, they are bound by the constitutional order. Intra-church tax laws must therefore comply with the minimum standards that apply to the levying of taxes in a state governed by the rule of law. If, at the time of setting out its own regulations for levying church tax a religious body follows the standards that are valid for state income tax, the principle following from Article 3.1 of the Basic Law that taxation must take economic performance into account applies to church tax.

The impugned judgment of the Higher Administrative Court complied with those constitutional requirements. The Federal Administrative Court's decision was also constitutionally unobjectionable.

The Higher Administrative Court had rightly affirmed that church legislature was bound by the principle of equality before the law. The result of the Court's interpretation was constitutionally unobjectionable. The Higher Administrative Court had not erred in its judgment as to the meaning and scope of Article 140 of the Basic Law in conjunction with Article 137.6 of the Weimar Constitution, nor had it erred as to the churches' right to self-determination. The Court had rightly assumed that the differences in the average incomes of church members in the *Länder* of Hamburg and Schleswig-Holstein could not justify the different rates of assessment. If the average income had indeed been chosen as a reference, then a higher rate of assessment had been established in the assessment area with the lower average income. That infringed Article 3.1 of the Basic Law, which, concerning tax law, provides that taxation be in accordance with the taxpayers' economic performance. That standard, which is compulsory when tax laws are made by the state, also applies to the intra-church tax legislature if, as in this case, church tax is levied in accordance with income tax.

The Chamber further stated that the mere fact that parts of the church territory belonged to different *Länder* was, pursuant to the Constitution, not a sufficient reason for differentiation. Finally, the different rates of assessment could not be justified by putting forward that their harmonisation required a consensus with the Catholic Church. Admittedly, such consensus between the churches was required for the administration of church tax by the state, but not for the abolishment of different rates of assessment within the Lutheran Church of the Northern Elbe region.

Supplementary information:

Article 137 of the Weimar Constitution:

137.3: Every religious body regulates and administers its affairs autonomously within the limits of the law valid for all. It confers its offices without the participation of the state or the civil community.

137.6: Religious bodies that are corporate bodies under public law are entitled to levy taxes in accordance with State law on the basis of the civil taxation lists.

Languages:

German.

GER-2003-1-005

05-02-2003 2 BvR 29/03

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 05-02-2003 / **e)** 2 BvR 29/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
4.7.2 **Institutions** - Judicial bodies - Procedure.
5.3.13.1.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Criminal proceedings.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

Keywords of the alphabetical index:

Criminal procedure, guarante / Proceedings, duration, influence on the assessment of punishment.

Headnotes:

In general, the principle of proportionality urges a review at every stage of the proceedings as to whether the means of prosecution and punishment employed for the protection of legal interests are still in adequate proportion to the restrictions of fundamental rights produced for the person affected. In a case of an excessive duration of proceedings, which is not in accordance with the principle of the **rule of law**, the principle of proportionality entails the obligation to review carefully whether the state can still prosecute the person affected, and if so, with which means.

A delay in the proceedings that is contrary to the principle of the **rule of law** must affect the assessment of punishment. In exceptional cases, it may even result in a discontinuance of the proceedings or in a stay in the proceedings that can be directly derived from the Basic Law's principle of the **rule of law**.

Summary:

I. The complainant was sentenced in a decision, from which an appeal did not lie, to a cumulative term of four years and six months' imprisonment for aiding and abetting *(Beihilfe)* fraud in repeated cases. The history of the trial was as follows. In May 1994 the public prosecutor had brought the charge. In June 1995 the Oldenburg Regional Court *(Landgericht)* had found the charges admissible, and the case had proceeded to trial. The trial had begun on 7 August 1995. Due to changes in the plan of assignment of court cases, the proceedings had been assigned to a different criminal division of the Regional Court in early 1996. There, the proceedings had begun anew on 17 May 1996. After 103 days of trial, the proceedings ended with the passing of the sentences on 22 May 1998.

The appellate proceedings before the Federal Court of Justice *(Bundesgerichtshof)* ended on 14 July 2000 with the delivery of a decision that overturned the matter in part and referred it back to the Oldenburg Regional Court. The new proceedings in that court ended with the complainant's conviction on 18 December 2001. Another set of appellate proceedings was dismissed as inadmissible by the Federal Court of Justice in an order dated 7 November 2002.

The complainant brought a constitutional complaint alleging that the proceedings had been unconstitutionally

delayed, and that the delay had not been taken into account in the sentences. He alleged a violation of his rights under Article 2.1 of the Basic Law (right to the free development of one's personality), Article 19.4 of the Basic Law (guarantee of recourse to law), Article 20.3 of the Basic Law (principle of the rule of law) and Article 101.1 of the Basic Law (right to the jurisdiction of one's lawful judge).

II. The Third Chamber of the Second Panel did not admit the constitutional complaint for decision; it gave, essentially, the following reasons.

1. The principle of the rule of law enshrined in the Basic Law requires that criminal proceedings be brought to a close within a reasonable time. A considerable delay in the proceedings for which the judicial authorities are responsible violates the right of an accused to a fair trial in accordance with the rule of law under Article 2.1 of the Basic Law, read in conjunction with Article 20.3 of the Basic Law. Whether the duration of proceedings is still reasonable must be assessed according to the circumstances of the individual case. In doing so, the delays in the proceedings for which the judicial authorities are responsible are to be taken into account first, then the total duration of the proceedings, the seriousness of the offence with which the accused is charged, the scope and the difficulties of the subject-matter of the case and the burden that the delay in the proceedings constitutes for the accused. As a general rule, the delays in the proceedings caused by the accused himself may not be used to substantiate the Court's finding that the rights of the accused have been violated by an excessive duration of the proceedings.

2. An excessively long trial can place considerable additional burdens on the accused. With an increasing delay in the proceedings, those burdens, the consequences of which can be equivalent to those of the penalty itself, conflict with the principle, which is itself derived from the principle of the rule of law, prescribing that punishment must be proportionate and in adequate proportion to the perpetrator's guilt.

3. Alone from the requirement set out in Article 6.1.1 ECHR that proceedings must take place within a reasonable time, it is obvious that the competent courts, in their application of criminal law and the law of criminal procedure, must draw the requisite conclusions from a delay in the proceedings, must explicitly state so in the case of a violation of the requirement of reasonable time and must ascertain in detail the extent to which this requirement has been taken into account. Moreover, that same procedure is required from the point of view of the importance of proceedings taking place within a reasonable time prescribed by the Basic Law's principle of the rule of law.

4. The Oldenburg Regional Court reviewed all stages of the proceedings including the final merger of sentences. The considerations stated in the grounds for the decision about the maximum time allowed to the judicial authorities for the different actions at different stages of the original proceedings on the basis of their scope and difficulty were justifiable. Those considerations did not give rise to the fear that the Regional Court could have misjudged the meaning or the scope of the complainant's claim to his entitlement to have the proceedings be concluded within a reasonable time.

The unconstitutionally excessive duration of 26 months in all of the proceedings found by the Regional Court had been taken into account in the impugned decision as a ground for mitigation of punishment in its own right, apart from the considerable interval between perpetration and conviction, and the burden that had been placed on the complainant by the long overall duration of the proceedings. Apart from this, the Regional Court had precisely set out the extent of the reduction in the sentence by determining what the adequate sentence would have been with and without taking into account the infringement of the obligation to ensure that proceedings take place within a reasonable time (a cumulative term of four years and six months as compared to a fictitious cumulative term of seven years and nine months).

Languages:

German.

Israel

Supreme Court

GER-2001-1-001 20-12-2000 2 BvR 591/00

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 20-12-2000 / **e)** 2 BvR 591/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
3.9 **General Principles** - Rule of law.
3.22 **General Principles** - Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.28 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Evidence, value / Evidence, evaluation / Informant / Evidence, indirect / Undercover agent / Witness, hearsay.

Headnotes:

The right to a fair trial can be affected if proceedings are conducted in a way that is contrary to a process that aims at ascertaining the truth, and thus, contrary to a fair judgment.

A constitutionally relevant violation only occurs, however, if an overall survey of all circumstances unequivocally shows that requirements that are indispensable from the point of view of the **rule of law** were not met.

Summary:

I. In 1998 the complainant was convicted by the Higher Regional Court in Frankfurt am Main onaccount of her participation in the hijacking of the Lufthansa aircraft "Landshut" to Mogadishu in October 1977. The Higher Regional Court found that evidence proved the complainant had transported the weapons that had been used in the hijacking from Algiers to Palma de Mallorca, where they were handed over to the hijackers. The court essentially based its findings regarding the complainant's participation in the hijacking on the statement of S., another participant in the crime. S., who was in custody in Beirut, could not be examined at the trial because the Lebanese authorities refused to transfer him to Germany for examination. On account of a request for assistance, S. had, however, made detailed statements as an accused to the Lebanese police in Beirut. In these interrogations, two officers of the Federal Office of Criminal Investigation *(Bundeskriminalamt)* had been present, who during the trial gave evidence as witnesses to the Higher Regional Court about the circumstances in which S.'s statement was made and about the contents of the statement.

The Higher Regional Court regarded S.'s statement, presented in this manner, as credible because it was confirmed by other important pieces of evidence. One corroborating piece of evidence was the statement given by the witness P., a senior official in the Federal Office for the Protection of the Constitution *(Bundesamt für Verfassungsschutz)*. P. stated that several documents existed that confirmed the complainant's plane journey from Algiers to Palma de Mallorca. P. claimed that, in the interest of protecting his informants, he could neither name the persons from whom the BfV had received the documents nor disclose the documents themselves, as this would involve the risk of revealing the identity of the person who had procured the

documents.

The witness G., a former head of criminal investigation at the Federal Office of Criminal Investigation, stated in the trial that he had received, from a reliable source, documents that confirmed that the complainant was identical to the person who had taken arms to Mallorca. G. also stated that he could neither submit the documents nor name his sources.

The Higher Regional Court was unsuccessful in its efforts to obtain from the Federal Ministry of the Interior permission for both hearsay witnesses to make more expansive statements.

Along with other circumstances and evidence presented at the trial, the Higher Regional Court also based its findings regarding the complainant's participation in the crime on the statement of the witness B., a former member of the terrorist group Red Army Faction *(Rote Armee Fraktion - RAF)*, who had been examined at the trial. B. stated that he had seen the complainant in Baghdad during the preparatory stages of the hijacking. The Court held that B.'s statement was an additional refutation of the complainant's claim that she had not left Aden. At the same time, B.'s statement was consistent with the statement of S. who had participated in the crime.

When her appeal was unsuccessful, the complainant, by way of a constitutional complaint, alleged that the conviction constituted a violation of the principle of a fair trial and of the prohibition of arbitrariness. The complainant also alleged that her conviction was inconsistent with Articles 6.1 and 6.3 ECHR, as the conviction had fundamentally been based on hearsay evidence and on the testimony of informants which cannot be confirmed because it was obtained in the framework of criminal investigation and of intelligence service activities. The complainant is of the opinion that, for these reasons, the conviction had, to a considerable degree, been based on sources that had remained anonymous. The Higher Regional Court concluded that this anonymous evidence compensated for the deficiencies of S.'s statements. The evidentiary value of S.'s statements was deficient because the statements were obtained in this specific interrogation situation, namely that S. was also a suspect to the crime and being held by the authorities with whom he might seek to curry favour by providing evidence against the complainant. In the complainant's opinion, this conclusion failed to meet the requirements that the Constitution places on the production of evidence in criminal proceedings. The complainant argued that the cumulative effect of the court's reliance on several pieces of hearsay evidence - the genesis of which cannot be autonomously assessed by the parties to the legal action - is in no way compatible with the case-law of the Federal Constitutional Court.

II. The Third Chamber of the Second Panel did not admit the case for decision, giving, in essence, the following reasons:

The right of access to the sources which serve as the basis for the findings of fact follows from the right to a fair trial. A constitutionally serious violation of this principle occurs only if an overall survey of all circumstances unequivocally shows that requirements that are indispensable from the point of view of the rule of law were not observed. The challenged judgments, however, meet the requirements of the right to a fair trial, although only just to a sufficient extent. They also fulfil the standards arising under Articles 6.1 and 6.3 ECHR, which are taken along with the case law of the European Court of Human Rights and of the Federal Court of Justice *(Bundesgerichtshof)* as a guide to the interpretation of this provision of the Basic Law. The relevant standards have been met even though the administration of procedural law by the court that presided over the case can be regarded as being situated at the borderline of what the Constitution permits as regards the organisation of proceedings.

As regards their evidentiary value, statements that originate from informants who are not examined during the trial are, as a general rule, not sufficient for the formation of judicial findings unless other important aspects and indicia confirm them. Therefore, increased care is required of the court presiding over the case if - as in this case - police or intelligence service informants cannot be heard as witnesses for the sole reason that the competent authority refuses to disclose their identities or to give them permission to testify. In such a case, it is the executive that prevents an exhaustive inquiry into the facts and makes it impossible for the parties to the legal action to verify the personal credibility of the informant whose identity remains in the dark.

The evidence on which the challenged judgment is based, is, however, not limited to the evaluation of (1) the testimony given by the police hearsay witnesses; (2) the statements of S., who is also an accused in the proceedings, which are contained in the testimony of the police hearsay witnesses; and (3) the statements of several police and secret service informants, agents and an "informants' leader", all of whom operate undercover in foreign countries. Rather, the Higher Regional Court relied in its evaluation of evidence, apart from the statements by the complainant herself, above all on the testimony of the (direct) witness B. The witness refuted, to the court's satisfaction, the complainant's statement that at the material time, she did not stay at the place of the criminal offence but exclusively in Aden. The Higher Regional Court also regarded this as a further confirmation of S.'s statement, which had been conveyed by the Federal Office of Criminal Investigation officials. The Higher Regional Court supported its conclusion that S.'s statements and the statements given by other sources were correct with the results of further investigations of the participating agencies. These further investigations were performed by the participating agencies on the basis of and in order to review the information provided by their sources. Under these circumstances, and in the framework of the required consideration of all the factors, the process employed by the Higher Regional Court cannot be criticised.

If, for these reasons, the proceedings regarded as a whole were fair according to the standards set by the Basic Law, the opinion of the Federal Court of Justice that the standards of fairness stipulated by Article 6.1 ECHR were not violated, is not objectionable from the constitutional point of view.

Languages:

German.

GER-2000-3-034

29-02-2000 2 BvR 347/00

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 29-02-2000 / **e)** 2 BvR 347/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
5.1.1.3.1 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners - Refugees and applicants for refugee status.
5.3.5.1.2 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Non-penal measures.

Keywords of the alphabetical index:

Deportation, custody, continuation / Deportation, enforceability / Deportation, custody / Deportation, impediment / Obligation to leave the country.

Headnotes:

A court maintaining an order of pre-deportation custody violates Article 2.2.2 of the Basic Law and the principle of the **rule of law** if it fails to take into account a bar to deportation that conflicts with the obligation to leave the country.

Summary:

I. In an order dated 25 January 1994, the Federal Office for the Recognition of Foreign Refugees

(Bundesamt für die Anerkennung ausländischer Flüchtlinge) turned down the complainant's application for asylum. The complainant, a Turkish citizen, appealed against this order by bringing an action before the responsible Administrative Court.

Before a judgement was issued in the pending action for the grant of asylum, the Aliens Authority in the federal state *(Bundesland)* Lower Saxony made an order to expel the complainant from Germany on account of a conviction for offences in violation of the German Narcotics Law *(Betäubungsmittelgesetz)*. The Authority ordered the complainant to be deported to Turkey at the time of his discharge from the prison sentence he received for these offences.

The complainant applied to the Administrative Court *(Verwaltungsgericht)* for temporary relief against the order requiring the immediate enforcement of his expulsion and deportation. In December 1999, the complainant was taken into pre-deportation custody, as the responsible court was of the opinion that there were reasonable grounds to suspect he would evade his deportation by disappearing after serving his prison sentence.

In July 1999, the Administrative Court made an order to hear evidence in the asylum proceedings to determine whether the complainant was threatened by political persecution for the very reasons that served as the basis for the institution of criminal proceedings against him.

The complainant immediately appealed to the Regional Court *(Landgericht)* against the order of pre-deportation custody, and in this context, he informed the Regional Court about the following matters:

1. his appeal against the rejection of his application for asylum;

2. his application for temporary relief against the expulsion and deportation order and the objection against this order; and

3. the order to hear evidence in the asylum proceedings.

When the Regional Court dismissed the complainant's immediate appeal in its order of 26 January 2000, the complainant appealed to the responsible Higher Regional Court *(Oberlandesgericht)*.

On 16 February 2000, the Higher Administrative Court *(Oberverwaltungsgericht)* of Lower Saxony held that the complainant's objection to the expulsion order should have the effect of suspending the order to deport the complainant to Turkey, until a judgement was issued in the objection proceedings. The Higher Administrative Court justified its decision by stating that, according to the present state of knowledge, the person seeking asylum was under the definite threat of being interrogated and tortured by Turkish security authorities upon his return to Turkey, as he was suspected of having supported the PKK. The court further held that no evidence had yet been produced pursuant to the order to hear evidence, and that an Administrative Court judgement had not been issued yet. As such evidence and the judgement of the Administrative Court were to be taken into account in the judgement on the complainant's objection to his expulsion, the court stated that at that time, no final decision about a deportation could be taken.

The complainant informed the Higher Regional Court responsible for issuing the judgement maintaining his pre-deportation custody about the Higher Administrative Court's judgement. Nevertheless, on 21 February 2000, the Higher Regional Court dismissed another objection to the continuation of the complainant's pre-deportation custody because they found that the order of pre-deportation custody to ensure deportation pursuant to § 57.2.5 of the German Aliens Act *(Ausländergesetz)* did not presuppose the obligation to leave the country was already enforceable.

In his constitutional complaint, the complainant challenged the continuation of his custody for the purpose of ensuring his deportation, alleging that, because his expulsion was impeded, pre-deportation custody was impermissible and constituted a violation of Article 2.2.2 of the Basic Law.

II. The Second Chamber of the Second Panel, for the following reasons, reversed and remanded the Higher

Regional Court decision because of a violation of the fundamental rights and freedoms of the person:

In conjunction with the principle of the rule of law, Article 2.2.2 of the Basic Law obliges the courts to comprehensively examine the prerequisites for ordering pre-deportation custody. In particular, during the appellate proceedings it must be examined whether the prerequisites for maintaining custody are still valid. As a general rule, it can be stated that these prerequisites are no longer met if an Administrative Court decision has eliminated the detainee's obligation to leave the country or if the detainee's deportation cannot be effected without the lapse of a prolonged period of time. If the deprivation of liberty is not necessary, because deportation is impeded, the principle of proportionality precludes the ordering (in the first instance) or maintenance of previously ordered pre-deportation custody.

When weighing the public interest in ensuring deportation against the personal liberty rights of the person who is to be deported, right to personal liberty will, with the increasing length of detention, gain importance as against the public interest. Apart from constitutional law, the principle of proportionality finds its expression in § 57.2.4 of the German Aliens Act, according to which pre-deportation custody to ensure deportation is impermissible if it is certain that for reasons beyond the concerned foreigner's control, deportation cannot take place within the next three months.

The Higher Regional Court did not take these constitutional criteria into consideration; in particular, it completely failed to consider § 57.2.4 of the Aliens Act.

Nor is there any evidence that the Higher Regional Court examined, as required by the Basic Law, whether and to what extent the Higher Administrative Court's decision to establish the suspensory effect of the objection conflicts, permanently or at least for a prolonged period of time, with deportation.

In the case of such a decision by an Administrative Court, which is only provisional, the court that is competent for ordering detention can nevertheless state that it has not been established that the deportation is impeded. Such a statement, however, presupposes that there is concrete evidence to indicate that the deportation, which was precluded on account of the grant of temporary relief by the Administrative Courts, could be possible again within the three-month period provided in § 57.2.4 of the Aliens Act.

In view of the facts of the case, which the Higher Regional Court could have ascertained without any problem (as required by the Basic Law), the Basic Law prohibits the Higher Regional Court from representing in this case that it was not certain the deportation would be impeded.

Moreover, as the Higher Regional Court did not take the question of proportionality into consideration, the case was to be remanded.

Languages:

German.

GER-2000-2-029

20-07-2000 1 BvR 352/00

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 20-07-2000 / **e)** 1 BvR 352/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
3.16 **General Principles** - Proportionality.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

Keywords of the alphabetical index:

Duty of office, violation / Measure, that expedites / Protection, legal, effective / Proceedings, speeding up / Damage / Civil proceedings.

Headnotes:

Article 2.1 of the Basic Law, in conjunction with the principle of the **rule of law**, is violated if a court does not take effective measures to counteract the excessive duration of civil proceedings.

Summary:

At the beginning of the 1970s the complainant, a building contractor resident in Saarbruecken, planned to build a shopping centre in his home town. The municipality designated, in a draft development plan, the intended location of the building as an area dedicated to non-residential use and had on several occasions conducted negotiations with the complainant about the project, *inter alia* about a development contract. The contract, however, was not concluded and no building permit was granted as the municipality eventually broke off negotiations. In August 1974, the complainant brought an action for damages against the municipality for breaking off negotiations for irrelevant reasons.

The action, which had been unsuccessful before the first two courts to hear the matter, was referred to the Higher Regional Court by the Federal Court of Justice in 1980 following an appeal lodged by the complainant. The complainant again lost in the proceedings before the Higher Regional Court. This judgement was reversed by the Federal Court of Justice in 1983 and again referred to the Higher Regional Court. In July 1984 the Higher Regional Court held on the merits that the defendant municipality was liable for damages. This judgement has been *res iudicata* since 1985. In July 1986, a final judgement was issued awarding the plaintiff damages amounting to approximately DM 5 million. In June 1989, the judgement regarding damages was partially reversed, on appeals lodged by both the defendant and the plaintiff with the Federal Court of Justice, and was again referred to the Higher Regional Court. The Higher Regional Court, in its second hearing of the damages issue, took extensive evidence, *inter alia* concerning the extent of the damages. The Higher Regional Court asked for several opinions from judicially appointed independent experts, not all of which had been delivered as of the filing of the complaint before the Federal Constitutional Court. At the end of 1999, the composition of the responsible panel of the Higher Regional Court changed; no judgement had been issued at the time of the present decision.

In his constitutional complaint, the complainant challenged the allegedly excessive duration of the proceedings. He argued that his constitutional right to effective legal protection had been violated. The complainant claimed that he had been negatively affected in all his business activities, to the point of endangering his economic existence, by the enormity of the damages connected with the case and the resulting financial burden for which he was unable to obtain any compensation on account of the excessive length of proceedings.

The First Chamber of the First Panel of the Federal Constitutional Court *(Bundesverfassungsgericht)* concurred in the complainant's opinion and held that the Higher Regional Court of the Saarland failed to make, in a reasonable period of time, a decision on the amount of the claim for damages, the necessity for which had been determined on the merits.

The grounds for the decision included the following:

Article 2.1 of the Basic Law, in conjunction with the principle of the rule of law, grants effective legal protection in civil law disputes.

Certainly no general rule can establish when a case is disproportionately long. When assessing the issue

from the constitutional point of view, all circumstances of the individual case must be taken into consideration, in particular the importance of the matter to the parties, the degree of complexity of the facts of the matter, the parties' behaviour as well as activities of third parties which cannot be influenced by the court, e.g. judicially appointed independent experts. However, with the increasing length of the proceedings as a whole, or with the increasing length of the proceedings before a specific court, the duty of the court to make sustained efforts to speed up and terminate the proceedings intensifies. This obligation on the court is connected with the right to have recourse to a court.

In this case, 26 years have passed since the action was brought, and 11 years since the last referral by the Federal Court of Justice. In this period of time, no decision has been made as regards the amount of the damages to which the complainant is entitled. This definitely exceeds the limits of what is tolerable from the point of view of effective legal protection. Certainly this case involves considerable legal and factual difficulties. The records of the case do not show that the proceedings have been delayed simply due to inaction. Neither do they show, however, that the court has made special efforts to speed up the proceedings. In the present case, the duty to make sustained efforts to speed up and terminate the proceedings is increased by the fact that the legal action affects the economic existence of the complainant. In view of the extraordinarily long duration of the proceedings, the Higher Regional Court, in this final stage of the case, should not have confined itself to treating the proceedings as a usual, albeit complicated, legal action. Rather, the Higher Regional Court should have made use of all possibilities at its disposal to speed up the proceedings. If necessary, the court was required to try to find relief measures within the court.

It is not the responsibility of the Federal Constitutional Court to dictate to the courts specific measures for accelerating proceedings. The decision about the measures to be taken is incumbent on the courts presiding over the respective case. Such measures cannot be made in abstract terms but must be tailored for the specific case, taking into consideration the reasons for the long duration of the proceedings. Even if the court has to rely on the co-operation of judicially appointed independent experts for its ruling, measures expediting the matter seem possible.

Criticism regarding the excessive length of proceedings cannot be based on the claim that a different judicial assessment of the issues of law to be decided could have resulted in a shorter duration of the proceedings. Criticism regarding the excessive length of proceedings may, however, be based on the claims that measures related to case management or the possibility of accessing other resources internal to the court could have led to a shortening of the proceedings. The proper assessment of a case, including the decision regarding which evidentiary methods will be used to establish the facts of the case, rests exclusively in the judgement of the responsible courts.

Languages:

German.

GER-2000-2-002

10-11-1998 | 2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10-11-1998 / **e)** 2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.17 **General Principles** - Weighing of interests.
3.18 **General Principles** - General interest.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.

5.2.2.12 **Fundamental Rights** - Equality - Criteria of distinction - Civil status.
5.3.33 **Fundamental Rights** - Civil and political rights - Right to family life.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.
5.3.44 **Fundamental Rights** - Civil and political rights - Rights of the child.
5.4.18 **Fundamental Rights** - Economic, social and cultural rights - Right to a sufficient standard of living.

Keywords of the alphabetical index:

Tax, deduction / Employment, gainful / Marriage, equality / Family, burdens, equalisation / Tax, tax-free household allowance / Child, care, cost.

Headnotes:

1. Article 6.1 of the Basic Law contains a specific principle of equality. It prohibits disadvantaging marriage and family as compared with other life and education relationships. This prohibition of discrimination precludes any detrimental differentiation connected to the existence of marriage (Article 6.1 of the Basic Law) or the safeguarding of parental rights in a cohabitation (Articles 6.1 and 6.2 of the Basic Law).

2. The financial ability of parents is reduced not only by the child's need of certain items for its daily life and of care during the time of gainful employment of the parents, but also by the need for child care in general. The cost of child care, as a necessary part of the bare subsistence level of the family (see BVerG 82, 60 [85]; 87, 153 [169 ff.]), must be exempted from income tax, no matter now the need is satisfied.

3a. In the necessary new regulation of tax-free child allowances, the legislator must also take the child's need of education into account; this applies, independently of the family status, to all parents who are conceded tax-free child allowances or receive child benefits.

3b. Insofar as the bare subsistence level of the family is based upon personal data such as family status, number and age of the children, it is necessary - in compliance with the **rule of law** demanding foreseeability and calculability of tax burdens - that this tax-relevant fact be defined in such a way that the mere presentation of such data is sufficient to ensure application of the law.

Summary:

I. According to § 33c of the Income Tax Act, single parents are allowed to deduct the cost of childcare, incurred through gainful employment, sickness or hindrance, from their taxable income. Parents with unlimited tax liability living in a conjugal community, however, are in principle liable to income tax also with their cost of childcare incurred because of the parents' gainful employment. Only when one parent living in conjugal community is sick or hindered and the other is either gainfully employed or also sick or hindered, are the costs of childcare taken into account.

The legislator further provided that extramarital educational communities are granted tax-free household allowances (§ 32 Income Tax Act) even when each of the parents is entitled to a tax-free basic allowance, while marriage partners are in principle not conceded such a tax-free household allowance. The tax-free allowance is intended to compensate for the higher expenses of single taxpayers who, because of their children, find themselves compelled to extend their homes and households. Singles with children are granted an additional tax-free allowance, comparable to another tax-free basic allowance, to ensure they are - in the proportional range of the income tax - taxed in the same way as jointly assessed marriage partners.

The tax-free household allowance granted is solely based upon the household of the single taxpayer; it is not increased with the number of children.

II. In 1983, 1984, 1986 and 1987, each of the five complainants lived in a conjugal community with their children below 16 years of age. At this time, both parents were in each case, at least temporarily, gainfully

employed and jointly assessed.

Applications for fiscal consideration of those expenses which had been incurred because of care of the children remained unsuccessful.

Upon legal action instituted by the complainants, the Financial Courts decided that the complainants cannot be included into the regulation concerning deduction of the cost of childcare and into the regulation concerning tax-free household allowances because each of these provisions refers exclusively to single parents with children.

The complainants appealed to the Federal Constitutional Court from these court decisions and, indirectly, from the corresponding legal provisions in their then versions, they alleged in particular a violation of their Fundamental Rights from Article 3.1 in conjunction with Article 6.1 of the Basic Law. Regarding the fiscal treatment of inevitable expenses for childcare, they argued that singles must not be privileged as compared with parents living in a conjugal community.

III. The Second Senate declared the legal provisions objected to (§ 33.1 - 4 of the Income Tax Act of December 1984, § 22.3 and 22.4 of the Income Tax Act of January 1984, § 32.7 of the Income Tax Act of April 1986), and all subsequent versions of the Act unconstitutional.

In its reasoning, the Senate explained that educational duty is within the personal responsibility of the parents; however, it need not be practiced exclusively by the parents themselves.

Article 6.1 of the Basic Law, as a negative right, at the time guarantees the freedom to decide oneself in which way life in one's conjugal community and family shall be arranged. Parents are free to plan and live their family life according to their own ideas; in their educational responsibility, they are also free to decide whether and in which developmental phase the child shall be predominantly taken care of by one parent alone, by two parents alternately, or by a third person.

The guardian function of the State resulting from Article 6.2.2 of the Basic Law does not authorise the State to urge parents to educate their children in a certain way, so the Second Senate declared. Rather, the Basic Law leaves decisions concerning educational principles to parents. As the child's interests are usually best safeguarded by its parents, they themselves can decide about the way in which the child is taken care of, about the child's possibilities of meeting friends and having experiences and about the contents of the child's education.

As stated by the Second Senate, Article 6.1 of the Basic Law contains a specific principle of equality. This principle forbids disadvantaging of marriage and family compared with other life and educational partnerships. This prohibition of discrimination precludes any detrimental differentiation in connection with the existence of marriage or the safeguarding of parental rights in a conjugal community (Articles 6.1 and 6.2 of the Basic Law).

Accordingly, discrimination also exists if and when marriage partners or parents, because of their marriage and family and because of the way marriage and family are arranged, are excluded from tax relief. The principle of fiscal equality demands, at least for direct taxes, taxation according to the taxpayer's financial capability.

The State has to ensure that the income of taxpayers to the extent of a "minimum subsistence level" is tax-free, the Second Senate held. In the case of families, this applies to the minimum subsistence level of all family members, i.e. including also that of the children.

The financial status of parents is reduced not only by the child's need of items for its daily life and of care during the time of gainful employment of the parents, but also by the need of childcare in general. Expenses for childcare, as part of the bare subsistence level of the family, must be exempted from income tax.

Because of the duty to ensure childcare, which reduces their working power or their financial availability,

taxpayers with children are less capable of paying taxes than taxpayers without children, argued the Second Senate. If the costs arising from the parental duty to bring up, educate and provide care for their children are neglected in the assessment of income tax, parents would be disadvantaged over and above tax payers without children, whose financial capacity is not reduced by the fulfilment of parental duties. In this context it makes no difference, the Second Senate held, how the needs of the child are met. The Income Tax Act must always exempt the cost of child care, no matter whether the parents themselves take care of the child, whether they prefer a third person taking temporarily care of the child, or whether both parents decide to work in a job and, therefore, avail themselves of a third person's help. These needs - different to the needs arising from the parents' gainful work - must, therefore, be taken into account independently of the actual cost paid.

In view of the State's duty to protect marriage and family in accordance with Article 6.1 of the Basic Law, the State is also confronted with the task of establishing and promoting the actual preconditions of childcare in the form chosen by the parents. Care of children represents a service which is also in the community's interest and which must be appreciated by the community, the Second Senate ruled. The State, accordingly, has to make sure that parents have a chance of both partly or temporarily giving up work to the benefit of personal childcare, and of combining family activities and gainful employment.

In the cases at issue, the Second Senate ruled that the legal provisions governing the fiscal treatment of the cost of child care and the deduction of household allowances violate the complainants' rights contained within Articles 6.1 and 6.2 of the Basic Law.

1. As far as the costs of childcare are concerned, the legal definition of those entitled to a deduction exceeds the group of singles who are exclusively dependent upon themselves. Only parents with unlimited tax liability who live in a conjugal community are in principle liable to income tax along with their cost of childcare incurred because of gainful work. Here, firstly, exclusion from the lump sum regulation which is not limited to inevitable expenses leads to a discrimination which is not compatible with Articles 6.1 and 6.2 of the Basic Law.

The protective scope of Article 6.2 of the Basic Law demands that the cost of childcare be taken into account for all parents, independently of whether, and if so, for what time the child is cared for by third persons.

2. The possibility of deducting tax-free household allowances for unmarried parents is incompatible with Article 6.1 of the Basic Law, because it is not conceded to conjugal educational communities but non-married parents even when they live in an educational community and when they are both liable to taxation.

This discrimination, the Second Senate ruled, cannot be justified by either an increase in household expenses as the result of a child in an extramarital educational community entitled to the deduction as compared with a cohabiting educational community. It is generally the case that that a child increases the cost of the parents' household.

3. Nor can the discrimination against parents living in a conjugal community be justified by the possibility of joint assessment, the Second Senate held. Joint assessment can be claimed by all parents, independently of whether they have dependent children or not. Hence, joint assessment is unsuitable to compensate for fiscal discrimination, because it would disadvantage married parents compared with marriage partners without dependent children. The relieving effect of joint assessment, furthermore, depends upon the level of income of each marriage partner and upon the rate of increase of such. Joint assessment has practically no effect if and when both husband and wife are gainfully employed and earn similar salaries.

The above-stated violation of the specific principle of equality of Article 6.1 of the Basic Law therefore cannot be remedied by repealing the tax privileges for 'false' single parents in the sense of § 33c Income Tax Act.

The regulation of the need of childcare violating equality does not neglect the fact that the need exists independently of sickness, hindrance or employment of the parents; nor does it depend upon the way childcare is practiced.

In the new regulation governing exemption of the cost of childcare from income tax, legislation will, therefore, have to allow for an identical care-related reduction of capability to pay taxes for all parents and to increase child allowances or child benefits correspondingly.

Educational needs, too, are not satisfactorily met by child allowances and child benefits. It is unfortunately the case that the minimum subsistence level does not adequately allow for the general costs, which parents have to meet for the socially adequate development of their child.

Such needs include - in contrast with the legal regulations - membership in clubs and other forms of meeting with other children or adolescents outside the family home, learning and practice of modern communication techniques, access to cultural and language expertise, responsible use of leisure times, and holiday arrangements.

To assess such educational needs, the present household allowance regulation gives an orientation in figures, which, however, are to be graded according to the number of children.

IV. The regulations found to be unconstitutional are to be further applied until 31 December 1999. The new regulation to be established after this date has to extend the needs of childcare to all parents, independently of the way in which parents satisfy such needs of their children.

Languages:

German.

GER-1996-2-019

29-05-1996 2 BvR 66/96

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 29-05-1996 / **e)** 2 BvR 66/96 / **f)** / **g)** / **h)** *Europäische Grundrechtezeitschrift*, 1996, 324; CODICES (German).

Keywords of the Systematic Thesaurus:

5.3.3 **Fundamental Rights** - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
5.3.11 **Fundamental Rights** - Civil and political rights - Right of asylum.

Keywords of the alphabetical index:

Terrorist act / Torture, anti-torture Committee / Extradition and torture.

Headnotes:

An extradition is in general not prohibited by the Constitution if the respective demand is based on the allegation that the person committed terrorist acts, even if such acts may be said to serve political goals.

The principle of the State governed by the **rule of law** does not prohibit the use of evidence against a person which was gained by illegal acts against another person.

Summary:

A Spanish citizen, being in Germany, was blamed for having participated in terrorist acts. Spain applied for the extradition of this person. The person said that the Spanish police only got information on him because it tortured another person; that the acts of which he was accused were of a political character; and finally that

he would risk his life in a Spanish prison as he suffered from Aids, for which adequate treatment could not be guaranteed in the prison. The Spaniard applied for asylum. A German court decided that he had to be extradited.

The Federal Constitutional Court rejected the individual constitutional complaint. It stated that the ordinary court did not violate the fundamental right of asylum by permitting the extradition because the activities of the Spaniard for which the extradition was demanded could not be qualified as political; membership in a terrorist group, of which he was accused, could not be considered to be a political act just because political motives were involved in the joining of this group. A person committing terrorist acts generally has no right to asylum, except for cases in which certain circumstances - for example the intensity of the measures of persecution - give reason to think that the person is persecuted on political grounds.

The Federal Constitutional Court stated further that the ordinary court did not violate the constitutional prohibition on extraditing a person to a country in which the minimum standard of public international law in a criminal persecution are not respected. A single violation of another person's rights by organs of the State demanding the extradition did not constitute proof of a risk for the person to be extradited. With reference to a report of the Committee for the Prevention of Torture, based on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Federal Constitutional Court came to the conclusion that there were no circumstances in which the Spaniard would be treated in a Spanish prison in a way which would operate to exclude his extradition. Finally, the Federal Constitutional Court did not find any facts which would lead to the conclusion that the Spanish courts would use evidence against the Spaniard which was obtained by illegal methods. This is forbidden by Spanish law. The use of evidence which Spanish organs obtained through the torture of another person was not forbidden by international law, as alleged in the given case, nor did it constitute a violation of a minimum standard of the Basic Law.

Languages:

German.

GER-1995-3-029 09-08-1995 1 BvR 2263/94, 1 BvR 229/95, 1 BvR 534/95

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 09-08-1995 / **e)** 1 BvR 2263/94, 1 BvR 229/95, 1 BvR 534/95 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Europäische Grundrechte Zeitschrift*, 1996, 42; *Neue Juristische Wochenschrift*, 1996, 709; CODICES (German).

Keywords of the Systematic Thesaurus:

4.7.15.1.4 **Institutions** - Judicial bodies - Legal assistance and representation of parties - The Bar - Status of members of the Bar.
5.4.4 **Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

Lawyer, withdrawal of admission / Former GDR, state security service, collaboration / *Stasi*.

Headnotes:

A legal provision which provides the possibility to revoke the admission of a lawyer to the bar because he

collaborated with the State security service of the former GDR and by doing so violated fundamental principles of humanity or of a State governed by the **rule of law** is not unconstitutional.

The collaboration itself is not a sufficient reason for revoking the admission.

Summary:

In 1992 a law was adopted according to which the admission of a lawyer to the bar by the Ministry of Justice of the former GDR could be revoked if the lawyer had collaborated with the State security service and had violated principles of humanity and of a State governed by the rule of law. The Constitutional Court declared the law constitutional. However, it upheld two individual constitutional complaints against decisions revoking the admission of two lawyers. The Court declared that the limitation of the freedom of profession would be disproportionate if the admission could be revoked for the fact only that the lawyer penetrated into the private sphere of another person and gave information about it to the State security service. The revocation of the admission is only justified if the lawyer violated fundamental human principles or if he could foresee that the information in question could lead to a violation of such rights. For these reasons, the Constitutional Court rejected another individual complaint in which the lawyer had given personal information about his client to the State secret service which contributed to the conviction of the client.

Languages:

German.

GER-1994-3-033

07-12-1994 1 BvR 1279/94

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07-12-1994 / **e)** 1 BvR 1279/94 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 1995, 91, 335 / **h)** *Europäische Grundrechte Zeitschrift*, 1995, 37; Neue Juristische Wochenschrift, 1995, 649; CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - International treaties.
2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
5.3.5 **Fundamental Rights** - Civil and political rights - Individual liberty.

Keywords of the alphabetical index:

Hague Convention, judicial and extrajudicial documents, meaning and service / Damages, punitive, rule of law / Treaty, international, fundamental rights.

Headnotes:

The service of a foreign law-suit in which punitive damages are claimed does not violate general personal liberty and the **rule of law**.

Summary:

A German enterprise was sued for product liability in the United States. German authorities should serve the American law suit in Germany according to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The enterprise filed an individual complaint based on the argument that the punitive damages to which it might be sentenced violate general personal liberty and

the rule of law. The Constitutional Court rejected the complaint. It stated that the Hague Convention does not violate constitutional rights. The principle of proportionality is not infringed by the Convention, although it provides that the service of a law suit may only be rejected if the sovereignty or the security of the State is jeopardised or, from general principle, if the subject of the law suit is incompatible with the Constitution. The sense of this regulation is that the State parties to the Convention shall only be allowed to reject the service of a foreign law suit on a limited number of grounds. This enhances the efficiency of the service. Besides, the Convention guarantees to all persons involved in a law suit the right to be heard before a court.

The service of a law suit which aims at punitive damages does not violate the Constitution. Punitive damages are unknown under German law. They fulfil purposes which in German law are obtained by other means. The service of such a law suit does not mean that the enterprise will be sentenced to punitive damages. In any case, the enterprise can defend itself against the execution of such a sentence, if it should be unconstitutional under German law, as far as it is directed against the property of this enterprise situated in Germany.

Languages:

German.

GER-1994-3-027

11-10-1994 1 BvR 1398/93

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 11-10-1994 / **e)** 1 BvR 1398/93 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 1995, 91, 176 / **h)** *Neue Juristische Wochenschrift*, 1995, 40; *Europäische Grundrechte Zeitschrift*, 1995, 76; CODICES (German).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
5.3.5 **Fundamental Rights** - Civil and political rights - Individual liberty.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.

Keywords of the alphabetical index:

House rent.

Headnotes:

It is a violation of personal liberty, and of the principle of a State governed by the **rule of law** if the factual basis for an expert opinion in judicial proceedings cannot be questioned by the parties and the court.

Summary:

House rents may be increased according to the general level of rents in the respective area for comparable houses or apartments. The general level of rents must often be determined by an expert who has to receive the relevant information from the owners or tenants of comparable houses in the area. In many cases these persons require that they should not be named, in order to protect their privacy. This means that in proceedings in which such an expert opinion is relied on, the parties and the court do not know the factual basis for the opinion. The Constitutional Court decided that the principle of fair trail requires that the factual basis for an expert opinion can be questioned in court. Only a few exceptions to this rule might be admitted in cases where it would otherwise be impossible to give an opinion if all the data upon which it was based were to be published. In the case under consideration, there was not sufficient evidence that it would not have been possible to write an expert opinion on the level of local house rents if the respective data were to be published. The Constitutional Court quashed a decision of the civil court which was based on an expert

opinion and the factual basis of which had not been questioned.

Languages:

German.

GER-1985-R-001 24-04-1985 2 BvR 2, 3, 4/83, 2/84

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 24-04-1985 / **e)** 2 BvR 2, 3, 4/83, 2/84 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 69, 1 / **h)** .

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
3.20 **General Principles** - Reasonableness.
4.11.1 **Institutions** - Armed forces, police forces and secret services - Armed forces.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.
5.3.26 **Fundamental Rights** - Civil and political rights - National service.

Keywords of the alphabetical index:

Conscientious objection, application, fully detailed / Defence, national, effective / Conscientious objection, recognition, proceedings / Weapon, use.

Headnotes:

In regulating the right of conscientious objection, the law must respect the fundamental right guaranteed by Article 4.3 of the Basic Law, while taking due account of the Constitution's basic decision in favour of effective national military defence.

The alternative service provided for in Article 12a.2 of the Basic Law is restricted to persons liable for military service who refuse to perform armed military service for reasons of conscience. It follows that the legislator has a duty to ensure that only those persons who can be assumed with reasonable certainty to satisfy the requirements of the first sentence of Article 4.3 of the Basic Law are recognised as conscientious objectors (confirmed by BVerfGE 48, 127). The new Conscientious Objection Regulating Act meets these requirements.

Under the second sentence of Article 12a.2 of the Basic Law, the legally permissible period of military service is the maximum period of alternative service. The purpose of the second sentence of Article 12a.2 of the Basic Law is to ensure that the burden on persons doing military service and persons doing alternative service is the same. In determining the duration of alternative service within the limits set by the second sentence of Article 12a.2 of the Basic Law, the legislator may therefore take account of the differences between military and alternative service.

Conscientious objectors who belong to ideological groups which oppose armed military service on principle, and whose rejection of such service on grounds of conscience thus appears self-evident, are none the less obliged, like all others who claim the fundamental right guaranteed by Article 4.3 of the Basic Law, to explain the reasons for their decision. The fundamental right to freedom of religion (Article 4.1 of the Basic Law) does not relieve them of this obligation.

The principles of proportionality and equal treatment (Article 3.1 of the Basic Law), which are grounded in the

rule of law, are not violated by the fact that conscientious objectors, regardless of their obligation to perform alternative service, must be recognised as such in administrative proceedings. In the legislator's view, which is constitutionally unobjectionable, only these two elements together - the obligation of performing alternative service and recognition proceedings - can ensure with sufficient certainty that only persons who refuse to perform military service for reasons of conscience are in fact exempted from such service.

Under the first sentence of Section 1.6.1 of the Conscientious Objection Regulating Act, the Federal authority may reject an application to be recognised as a conscientious objector only if it concludes with certainty, on the basis of a fully-detailed application, that the applicant's motives do not entitle him to refuse to perform military service.

In recognition proceedings, the authority concerned is not obliged to disprove the applicant's claim that he refuses to perform military service for reasons of conscience - in other words, the authority is not obliged to accept it if there is a doubt.

Under the Basic Law, the second sentence of Section 1.8 of the Conscientious Objection Regulating Act (conscription when the country is threatened with, or under, attack) must be interpreted in such a way that the conscript may, until the recognition proceedings have been finally concluded, be required only to perform unarmed duties. Thus interpreted, this provision does not interfere with the fundamental right protected by the first sentence of Article 4.3 of the Basic Law. It exempts applicants only from activities which, in the current state of weapons technology, are directly connected with the use of weapons of war.

Languages:

German.

HUN-1996-3-009 25-10-1996 49/1996

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25-10-1996 / **e)** 49/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 91/1996 / **h)** .

Keywords of the Systematic Thesaurus:

1.1.4.2 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Legislative bodies.
1.3.5.10 **Constitutional Justice** - Jurisdiction - The subject of review - Rules issued by the executive.
1.3.5.15 **Constitutional Justice** - Jurisdiction - The subject of review - Failure to act or to pass legislation.
3.9 **General Principles** - Rule of law.
4.6.2 **Institutions** - Executive bodies - Powers.
4.6.9 **Institutions** - Executive bodies - The civil service.

Keywords of the alphabetical index:

Status, legal / Government, member.

Headnotes:

Regulating the legal status and pay of the members of the Government and also the manner in which they may be impeached by a decision of the Council of Ministers violates the constitutional principle of the **rule of law**.

Summary:

The petitioner requested constitutional review of Article 13 of Law III of 1973 on the legal status of members

of the Council of Ministers and the under-secretaries, according to which the head of the Council of Ministers has an authority to regulate the questions concerning the employment of the members of the Council of Ministers and under-secretaries. The petitioner also requested review of the decision of the Council of Ministers regulating the legal status of the leading civil servants. In the petitioner's opinion, the two legal regulations in question were unconstitutional, and the Constitutional Court should call upon the legislator to comply with its legislative duty concerning the legal status of the members of the Government.

The Constitutional Court declared that Article 13 of the Law in question is contrary to the rule of law since it is against the Constitution which requires that the legal status and pay of the members of the Government and also the way in which they may be impeached, should be regulated by statute (Article 39.2 of the Constitution).

The Constitutional Court also held unconstitutional the decision of the Council of Ministers based upon the unconstitutional authorisation of Article 13 of Law III of 1973.

According to Article 78.2 of the Constitution the Government bears the obligation of submitting to Parliament the Bills necessary for the enactment of the Constitution. Since the Government failed to submit the relevant bill, the Parliament could not meet its legislative obligation; therefore the Constitutional Court requested Parliament to comply with its legislative duty before 15 June 1997.

Languages:

Hungarian.

HUN-1996-1-004 03-05-1996 16/1996

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 03-05-1996 / **e)** 16/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 35/1996 / **h)** .

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
4.10.7 **Institutions** - Public finances - Taxation.
5.3.38.4 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Taxation law.

Keywords of the alphabetical index:

Tax exemption, reversal.

Headnotes:

The reversal or reduction of a tax exemption given for a defined time period before the expiration of that period is usually unconstitutional because it violates legal certainty and consequently the principle of the **rule of law** expressed in Article 2 of the Constitution.

A distinction must be made between tax reductions granted for a short term and those that are long term. The reversal of tax reductions given for a short period of time are especially not acceptable constitutionally. In the case of long-term tax exemptions, proportionally with the duration of the exemption, exceptionally the legislator may reverse it in event of basic and significant changes in the circumstances. This may be particularly the case when the changes in the circumstances compared to those at the time of the granting of the exemptions would make it disproportionally hard or even impossible for the State to uphold the exemptions. Thus tax exemptions given for a defined time generally cannot be reversed. But exceptionally tax exemptions given for a long time period might be reduced or reversed constitutionally.

Summary:

An amendment in 1994 to the Act on Corporate Taxes of 1991 reduced the exemptions granted in 1988 for companies operating with foreign capital. The exemption was originally granted for ten years. The amendment of the law as a matter of fact did not abolish the tax exemption but split the respective tax into two parts. The exemption applied automatically only for one part of the tax, while additional prerequisites were set out for attaining exemption for the other part. According to the Constitutional Court the reversal concerned the original tax, and did not amount to the introduction of a new tax. Therefore the constitutional review focused on the constitutionality of the reversal of an exemption granted for a limited time period.

Supplementary information:

The decision extensively quoted the Constitutional Court's previous rulings on tax exemptions.

Four judges out of the nine dissented. One judge wrote the dissenting opinion in which the other three concurred. The dissent warned of the dangers of the generalisation in the majority's opinion. The principle of maintaining confidence in the certainty of legal regulations cannot be examined only in terms of duration of time; the examination of the gravity of the reasons relied on by the legislator for amending the law, and especially the proportionality of the goals and the means applied, were also important elements in reaching a well-founded decision.

Languages:

Hungarian.

HUN-1994-3-018 17-11-1994 57/1994

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 17-11-1994 / **e)** 57/1994 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 113/1994 / **h)** .

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
3.18 **General Principles** - General interest.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.8.4.1 **Institutions** - Federalism, regionalism and local self-government - Basic principles - Autonomy.
4.8.7.3 **Institutions** - Federalism, regionalism and local self-government - Budgetary and financial aspects - Budget.
5.1.1.5.2 **Fundamental Rights** - General questions - Entitlement to rights - Legal persons - Public law.
5.3.38 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Real estate, local government / Local self-government, property.

Headnotes:

Local governments are free to dispose of their own property within the limits determined by law; the appropriation of their incomes resulting from the sale of flats can be determined by reference to the public interest.

Intervention by the legislature in the budget of local governments during the fiscal year, without compensation, constitutes retroactive legislation that violates the constitutional principles of the **rule of law**

and legal certainty.

Summary:

In 1993 the Constitutional Court declared unconstitutional several provisions of the law on the leasing and the alienation of living accommodation (flats) and other premises. (See *Bulletin* 1993/3, 22). Thus, Parliament amended the Act in 1994. The amended law was challenged in several petitions. The Constitutional Court declared unconstitutional and annulled two provisions of the amended law. These provisions regulated the utilisation of income of the local governments stemming from the sale of flats and other premises. (Real estate went from being State property to local governments' property in 1990.) Under the law, the appropriation of the incomes in question is strictly limited; furthermore, in the capital, the districts are obliged to deposit fifty percent of the income to the account of the municipality. The Court found constitutional the intervention in the appropriation of the local governments' income in the public interest in the case of flats. However, the Court declared a violation of legal certainty, and consequently of the rule of law, in the retroactive interference in the budget of the local governments, so it suspended the applicability of the respective provisions of the law until the end of the fiscal year. Moreover, the Court did not accept the same argument in the case of other premises, and annulled the respective provisions. The other challenged provisions of the law were upheld by the Court.

One judge wrote a dissenting opinion.

Languages:

Hungarian.

ITA-2004-1-001 13-01-2004 24/2004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13-01-2004 / **e)** 24/2004 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the Systematic Thesaurus:

1.1.3 **Constitutional Justice** - Constitutional jurisdiction - Status of the members of the court.
3.9 **General Principles** - Rule of law.
3.18 **General Principles** - General interest.
4.4.4.1.1.3 **Institutions** - Head of State - Status - Liability - Legal liability - Criminal liability.
4.5.11 **Institutions** - Legislative bodies - Status of members of legislative bodies.
4.6.10.1.3 **Institutions** - Executive bodies - Liability - Legal liability - Criminal liability.
5.2 **Fundamental Rights** - Equality.
5.3.13.1.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Criminal proceedings.
5.3.15 **Fundamental Rights** - Civil and political rights - Rights of victims of crime.

Keywords of the alphabetical index:

Council of Ministers, President, criminal proceedings, suspension, duration / Parliament, chamber, speaker, criminal proceedings, suspension, duration / Constitutional Court, President, criminal proceedings, suspension, duration.

Headnotes:

The principle of equality admits of different rules governing different situations. However, where appropriate, it must be verified that a difference in treatment provided for by law in different situations does not undermine fundamental values of the legal system. In the case under consideration the legislature sacrificed equal

treatment before the courts, a fundamental principle under the **rule of law**, for the sake of the need to protect the highest state officials from the consequences of being accused in criminal proceedings. The fact that suspension of proceedings was automatic prevented state officials from continuing to hold office (as was their right under Article 51 of the Constitution) if they wished to be able to prove their innocence through the courts. The rights of civil parties to proceedings, who had to endure the trial's suspension, were also sacrificed.

Justice must be administered within a reasonable time, as expressly required by Article 111 of the Constitution since the constitutional reform of 1999. Otherwise, the right of action and the right to a fair trial were jeopardised, as the Court had not failed to point out in Judgment no. 354 of 1996 concerning suspension of a trial for an indefinite period.

By treating the Speakers of the two Chambers of Parliament, the President of the Council of Ministers and the President of the Constitutional Court differently from other members of the organs over which they presided, the provision referred to the Court drew a distinction which was not provided for by the Constitution and which breached the principle of equality of members of the same constitutional body.

Summary:

The Milan Court, before which criminal proceedings were pending against the President of the Council of Ministers, Mr Silvio Berlusconi, in respect of events dating back to before he took office, raised the question of the constitutionality of the second paragraph of Article 1 of Law no. 140 of 20 June 2003, in the light of the first paragraph of the same section, since, without amending by way of a constitutional law. Articles 90 and 96 of the Constitution (respectively concerned with the President of the Republic's liability for high treason or breaches of the Constitution and with offences committed by the President of the Council of Ministers or by ministers in the performance of their duties), it provided for the suspension, as from its entry into force, of criminal proceedings pending against the President of the Republic, the Speaker of the Senate or the Chamber of Deputies, the President of the Council of Ministers or the President of the Constitutional Court, no matter what stage those proceedings had reached and regardless of the nature of the offence (except where linked to the performance of their duties), which could concern events dating back to before they took office. The suspension was to last for the entire duration of their term of office.

The Court found that, by providing for an automatic, general suspension of proceedings pending without fixing any time-limit, the legislation in question violated:

1. Article 3 of the Constitution with reference to Article 112 of the Constitution, whereby initiating criminal proceedings was mandatory;

2. Articles 68, 90 and 96 of the Constitution, since, without having had recourse to a constitutional law, it conferred on those concerned by those articles prerogatives not provided for in the Constitution;

3. Articles 24, 111 and 117 of the Constitution, since it deprived the accused and the civil parties of the right to a fair hearing, in breach of the European Convention on Human Rights.

The Court considered the various circumstances in which suspension of criminal proceedings was already provided for under Italian law with the aim of guaranteeing the conditions necessary to fair conduct of the trial, even if that entailed a temporary suspension of the rights at stake (as with suspension of proceedings in cases where the accused was incapacitated and accordingly unable to take a conscious role in the trial). Parliament could naturally introduce other cases of suspension, but not without verifying beforehand the conditions to be fulfilled by such suspensions and the purposes served.

The aim of the legislation referred to the Court was to ensure that the state's highest officials could perform their duties with the necessary peace of mind by sparing them the obligation to appear in court. It accordingly served a significant interest, worthy of being pursued in accordance with the fundamental principles of the rule of law.

The Court examined the characteristics of a suspension, as governed by the legislation before it. Such a

suspension was general in nature, since it concerned all offences perpetrated before the official took office or during his or her term of office (in the latter case, the offences must not have been committed by the President of the Republic or the President of the Council of Ministers in the performance of their duties, since Articles 90 and 96 would then apply); it was also automatic, since it was applicable whenever the holders of any of the above offices were accused, irrespective of the specific circumstances of the case; lastly, its duration was not foreseeable in that the same person could enjoy immunity from proceedings while turn by turn holding all of the offices to which the measure applied.

Article 1, paragraph 2, of Law no. 140 of 20 June 2003, which provided for the suspension of criminal proceedings pending against the Speakers of the two Chambers of Parliament, the President of the Council of Ministers and the President of the Constitutional Court, was accordingly ruled unconstitutional, with reference to Articles 3 and 24 of the Constitution. Pursuant to Article 27 of Law no. 87 of 1953, the Court also declared unconstitutional paragraph 1 of the same section, establishing the principle of the above officials' immunity from criminal proceedings, and paragraph 3, which became totally inapplicable if the two above-mentioned paragraphs no longer existed.

Supplementary information:

A request for an abrogative referendum was lodged concerning Article 1 of Law no. 140 of 20 June 2003 and was found admissible by the Court, pursuant to Article 75 of the Constitution, in Judgment no. 25 of 2004, [ITA-2004-1-002].

Languages:

Italian.

ITA-1999-2-008 22-07-1999 341/1999

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22-07-1999 / **e)** 341/1999 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 30, 28.07.1999 / **h)** CODICES (Italian).

Keywords of the Systematic Thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
4.7.2 **Institutions** - Judicial bodies - Procedure.
5.1.1.4.2 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Incapacitated.
5.2.2.8 **Fundamental Rights** - Equality - Criteria of distinction - Physical or mental disability.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.9 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Public hearings.
5.3.13.21 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Languages.
5.3.13.25 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to be informed about the charges.

Keywords of the alphabetical index:

Trial proceedings, influencing / Interpreter, assistance / Criminal proceedings.

Headnotes:

The constitutional guarantee on the right to a defence ensures that defendants in a criminal trial can

participate effectively, especially at all stages of the trial during which the legal system provides for a public hearing. This implies that defendants shall be able both to understand the charge and the other parties to the trial and to express themselves in turn in such a way as to be heard and understood. Moreover, the Court has always held that the characteristics peculiar to criminal proceedings and the interests involved make it necessary for defendants to be able to participate in a direct and personal manner and to conduct their own defence, by which means they can influence a trial's process of argumentation. This is a fundamental right of defendants at all stages of proceedings, from investigation to judgment.

Whereas defendants' rights are generally upheld by virtue of their right to attend proceedings, speak whenever they see fit, speak last and consult their counsel whenever they wish, save under examination and before replying to questions addressed to them, special protective measures are necessary when for specific personal reasons defendants are incapable of understanding what others are saying or of expressing themselves in a comprehensible manner.

Although Italian legislation conforms to the rules of international conventions in that it protects defendants who neither understand nor speak Italian by providing the assistance free of charge of an interpreter, it has not made similar allowances for defendants who, by virtue of their physical disability (being deaf or dumb, or both), can neither hear nor speak or are incapable of either one of these faculties. In such cases, the same requirement of protection which has led to legal guarantees on the assistance of an interpreter for defendants unfamiliar with Italian should be applied. Yet protection for defendants with a disability has been more general and limited in its scope: the **rule of law** here challenged provides that communication with disabled defendants shall take place in writing, and interpreters are appointed only where a defendant can neither read nor write. The sole purpose of this rule appears to be to guarantee the smoothness of proceedings; it does not safeguard such defendants' procedural rights.

Summary:

By means of a "supplementary" decision, the Court found that Article 119.2 of the Code of Criminal Procedure was incompatible with Article 24 of the Constitution in that it did not allow deaf, mute or deaf-mute defendants the right to the free assistance of an interpreter - to be chosen in preference from among those persons with whom they regularly communicated - in order that they might understand the charge and trial proceedings, irrespective of whether they could read or write. Specifically, the Court extended to all disabled people, not just to those who were also illiterate, the right to the assistance of an interpreter accustomed to communicating with them.

Cross-references:

The Court referred to its previous decisions (nos. 9 of 1982 and 10 of 1993) on the requirement that defendants be capable of understanding the charge and the other parties to a trial and of expressing themselves in a comprehensible manner.

Regarding the right to defence as a fundamental right of defendants at every stage of proceedings, it referred primarily to Judgment no. 99 of 1975 and also to Judgments nos. 205 of 1971 and 186 of 1973.

Regarding the possibility for defendants to consult counsel for the defence whenever they wish, save under examination or before replying to questions addressed to them, the Court referred again to its decision no. 9 of 1982 and, additionally, to Judgment no. 216 of 1996.

Regarding the right of defendants who "cannot understand or speak the language used in court" to receive the free assistance of an interpreter, the Court refers to Article 6.3.e ECHR and to Article 14.3.f of the International Covenant on Civil and Political Rights. These provisions are incorporated in Italian law through Article 143.1 of the Code of Criminal Procedure, as extensively interpreted by Judgment no. 10 of 1993, already mentioned.

Languages:

Italian.

ITA-1996-3-010 02-11-1996 379/1996

a) Italy / **b)** Constitutional Court / **c)** / **d)** 02-11-1996 / **e)** 379/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 45, 06.11.1996 / **h)** CODICES (Italian).

Keywords of the Systematic Thesaurus:

1.3.4.2 **Constitutional Justice** - Jurisdiction - Types of litigation - Distribution of powers between State authorities.
1.3.5.9 **Constitutional Justice** - Jurisdiction - The subject of review - Parliamentary rules.
3.13 **General Principles** - Legality.
4.5.4.1 **Institutions** - Legislative bodies - Organisation - Rules of procedure.
4.5.8 **Institutions** - Legislative bodies - Relations with judicial bodies.
4.5.9 **Institutions** - Legislative bodies - Liability.
4.5.11 **Institutions** - Legislative bodies - Status of members of legislative bodies.

Keywords of the alphabetical index:

Criminal proceedings / Parliament, autonomy / Forgery of documents / Public figure (*Pubblici ufficiali)* / Voting / Parliamentarian, absent / Impersonation.

Headnotes:

In the constitutional system, the dividing line between the independence of the Houses of Parliament and the requirement of compliance with the law is almost invariably unequivocal: when the actions of a parliamentarian fall entirely under the rules governing Parliament, the requirement of compliance with the law and the associated precepts must be subordinate to the principle of the independence of Parliament and to the precept - paramount in such a case - of the freedom of Parliament underlying this last principle, which provides for absolute self-determination with regard to the internal organisation and activities of the Houses. If, however, the activities are, even partially, beyond the prescriptive scope of parliamentary rules of procedure, then what prevails is the overriding principle of the **rule of law** and submission to the courts to which, in the constitutional system in force, each legal interest and each right is subject (Articles 24, 112 and 113 of the Constitution).

Summary:

The application of the principle of equality does not mean that every aspect of parliamentary life can give rise to criminal proceedings since there is a conflict between the vision of an all- embracing criminal law and the principle of the independence of the Houses of Parliament and the associated guarantee of non- interference by the courts in the activity of these assemblies. The latter have an independent status defined in various provisions of the Constitution, primarily Articles 64 and 72 relating to parliamentary rules of procedure, the first set, internal and the second set, governing the legislative process for questions which are not directly governed by the Constitution.

The Constitution not only guarantees the independence of the Houses of Parliament (Article 64.1 of the Constitution) but also refers to the enforcement of rules of procedure, including the choice of regulations to ensure the former are observed. Consequently, the courts have no instruments with which they can guarantee observance of parliamentary law.

In the case-law of the Court, the freedom guaranteed to parliamentarians and their activities is not considered to be the privilege of a political class or an individual prerogative of the members of the Houses of Parliament, but is seen as a means of protecting the independence of the parliamentary institutions; this independence is,

in turn, designed to guarantee freedom of political representation. Defence of this prerogative is entrusted exclusively to the members of parliament directly concerned, and is among the two Houses' own attributions.

Whether the activities of parliamentarians come under the independence safeguard afforded to the Houses of Parliament by Articles 64, 72 and 68 of the Constitution, or whether, on the contrary, they are governed by ordinary law, depends primarily on the constitutional system governing the interests involved in the individual case. When these activities violate the interests of members of the Parliament, account has to be taken of the difference between the rights which are theirs as individuals and the rights accorded to them as members of the Parliament, the latter being strictly related to their special status. The former are inherently enforceable in court, regardless of the independence of the Houses of Parliament: accordingly, activities which violate the rights of individuals must not be considered as beyond the jurisdiction of the courts. The latter, on the other hand, are based on the status of parliamentarian, and have a status deriving from the Constitution and shaped by the principle of the independence of the Houses of Parliament; with reference to the latter rights, the non-interference of the courts must be considered absolute insofar as it is designed to protect the independence of the Houses of Parliament, which is guaranteed by Articles 64, 72 and 68 of the Constitution: Parliament must be free to act in its own sphere of competence and it is the exclusive responsibility of the two Houses to provide for remedies for actions which may have negative consequences for the duties of the members of parliament and for parliamentary proceedings; without any doubt whatsoever, these activities include voting in Parliament.

If it is held that the actions of parliamentarians are regulated exclusively by the rules of procedure, other forms of law, either contradictory or complementary, cannot be taken into account and the courts cannot undertake an external review; this is in fact the gist of the restrictions concerning the application of the law imposed by Articles 64 and 72 of the Constitution for each of the Houses.

The dividing line between the two supreme principles, that of the independence of the parliamentary assemblies and that of compliance with the law and submission to the courts, is monitored in Italy by the Constitutional Court, to which a matter is referred in cases of a conflict of jurisdiction between the Legislature and the Judiciary, in which one claims to have suffered prejudice or to have been weakened by the activities of the other.

In judgment 379 of 1996, the Constitutional Court resolved the conflict between the powers of the Legislature and the Judiciary, in a case brought by the Chamber of Deputies against the State Prosecutor and the Judge responsible for preliminary investigations at the Rome Court, the Prosecutor and Judge having ruled that Article 68 of the Constitution on parliamentary immunity was not applicable to the proceedings against two former deputies charged with the offences of forgery of documents by a public official and impersonation, provided for, along with sanctions, under Articles 479 and 494 of the Criminal Code. With the consent of two absent deputies, they had falsely claimed to be their absent colleagues and attended a parliamentary session in 1995 and had taken part in the vote. The Court, having rejected various objections as to inadmissibility, and basing their deliberations on the principles outlined in the Headnotes, allowed the appeal of the Chamber of Deputies, taking the view that it was not incumbent upon the aforementioned judicial authorities to take action against these parliamentarians for the above offences. In so doing, it annulled the charges brought by the authorities in question against the parliamentarians concerned.

In the case in question, the Constitutional Court confirmed that the activities of the deputies concerned, ruled by the court to be of a criminal nature, should be considered - since they fell entirely within the scope of the parliamentary rules of procedure - not to be subject to procedures other than those provided for in the rules of procedure of the two parliamentary assemblies. In practice, from the point of view of parliamentary law, the breaches which occurred affected: the voting arrangements, the legitimacy of the session, the correctness of the total of parliamentarians present, the validity of the records, the powers of the speakers to verify the vote and the announcement of the results. The Court subsequently observed that maintaining public trust should in this case form part and parcel of the procedure for assessing compliance with the rules governing parliamentary activities - a matter which falls exclusively to the Chamber itself.

Similar considerations apply to offences concerning impersonation. In the concluding part of the grounds for its decision the Court observed that «in the constitutional state in which we live, the appropriateness of

monitoring mechanisms, the legitimacy of sanctions provided for in the regulations and their rapid application in the most serious cases of violation of parliamentary law present the Parliament with a problem, if not of compliance with the law, then certainly of upholding the legitimacy of the principles regarding independence, which protect parliamentary freedom».

Cross-references:

With regard to the merits of the case, the Court referred first of all to judgment 129 of 1981 on the scope of the independence of the two Houses of Parliament, guaranteed by Article 64.1 of the Constitution.

In respect of the fact that defence of the prerogative of the incontestability of opinions expressed and votes cast by the members of parliamentary assemblies in the performance of their duties was a matter for Parliament and not for each parliamentarian concerned, the Court referred to its judgment 1150 of 1988.

Lastly, with reference to the system for resolving conflicts of the type referred to above, specified by the Court in order to resolve certain hypothetical cases of conflicts between two principles, both having constitutional validity, namely on the one hand, defence of certain interests such as honour, reputation, and equal human dignity, defined by the Constitution as inviolable, and on the other, the incontestability of parliamentarians' opinions, the Court referred to judgment 129 of 1996 and, once again, judgment 1150 of 1988.

Languages:

Italian.

LAT-2003-1-005

23-04-2003 | 2002-20-01 | On the Compliance of Article 11 (the Fifth part) of the Law _"On State Secrets_" and the Cabinet of Ministers 25 June 1997 Regulations _"List of Objects of State Secrets_" (Chapter XIV, Item 3) with Article 92 of the Constitution *(Satversme)* of the Republic of Latvia

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23-04-2003 / **e)** 2002-20-0103 / **f)** On the Compliance of Article 11 (the Fifth part) of the Law "On State Secrets" and the Cabinet of Ministers 25 June 1997 Regulations "List of Objects of State Secrets" (Chapter XIV, Item 3) with Article 92 of the Constitution *(Satversme)* of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 62, 24.04.2003 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.4.3 **Fundamental Rights** - Economic, social and cultural rights - Right to work.
5.4.4 **Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

Secret, state / State security / Hearing, right / Justice, principle.

Headnotes:

It is especially important to consider alternative procedures by which a person may protect his/her rights to the highest degree possible, where the right to have a case reviewed in a fair court is denied. A state based on the **rule of law** may set up a well thought-out mechanism to take into consideration the interests of every person subject to clearance for access to state secrets and, at the same time, also take into consideration the interests of state security when reaching a decision on issuing a special permit. The principle of justice requires that a person subject to such clearance enjoys the right of expressing his/her viewpoint and being heard before a refusal to grant the special permit is issued.

The impugned provisions shall be interpreted in compliance with the Constitution and, in each particular case, to ensure as much as possible the realisation of the right to a hearing. If the impugned provisions are interpreted that way, they comply with Article 92 of the Constitution.

Summary:

The Law "On State Secrets" lists the cases where access to state secrets is prohibited. Where the issue of granting special permits to specific persons is decided, those persons shall be checked according to the procedure laid down in the Law on State Security Institutions; the institutions shall examine and reach a conclusion as to the effectiveness of the restrictions. The impugned provisions of that Law set out that a decision refusing the grant of a special permit or reducing a special permit category may be appealed to the Director of the Constitutional Defence Bureau (henceforth: the "CDB"). The decision of the Director of the CDB may be appealed to the Procurator General, whose decision shall be final and not subject to appeal.

The impugned provisions of the Cabinet of Ministers Regulations no. 226 "List of Items subject to State Secrets" provide that the following items shall be considered subject to State secret: "specific record-keeping documents, materials of security clearance, deeds of conveyance and destruction of the objects of State secrets"; they also set out the levels of secrecy of state secrets: "extremely secret, secret and confidential".

The person filing the constitutional claim, Andris Ternovskis, was appointed Head of the Jelgava Border Guard Structural Unit on 27 February 1997. On 15 January 1999 the CDB adopted a decision to refuse the request of A. Ternovskis for a special permit for access to state secrets. On that basis, he was dismissed from his post and retired from the Border Guard service due to unsuitability for service.

The ordinary courts rejected the request of A. Ternovskis for reinstatement in the post of Head of Jelgava Border Guard Structural Unit. In a judgment, the Senate of the Supreme Court emphasised that A. Ternovskis could not be reinstated in that post, which required a special permit for access to state secrets, on the ground that the CDB Director had not granted that permit and the decision had not been annulled.

In his constitutional claim, A. Ternovskis pointed out that the impugned provisions denied him the possibility of having his cased reviewed in an objective and independent court and were not in conformity with Article 92 of the Constitution.

The Constitutional Court emphasised that the first sentence of Article 92 of the Constitution provided: "everyone has the right to defend their rights and lawful interests in a fair court"; however, it did not mean that a person is guaranteed the right of adjudicating any issue that he or she finds important in a court. The person has the right of protecting only his or her "rights and lawful interests" in a fair court.

The Court considered that it could not be concluded that a person "has the right and lawful interest" to acquire information that (in compliance with the law) has been recognised to be a state secret.

On the other hand, the Court held that the right to freely choose employment enshrined in Article 106 of the Constitution meant also the right to keep the post. However, the rights set out in Article 106 of the Constitution might be subject to restrictions. State security requires that access to state secrets should be granted only to persons, whose personal characteristics show no risk that a state secret might be revealed. On the one hand, those restrictions are needed in a democratic society as they strike a reasonable balance between the public interests and interests of an individual. On the other hand, restrictions with regard to any particular person are

permissible only where the refusal to grant the special permit is well-founded.

The impugned provisions restricted the fundamental rights that are incorporated into Article 92 of the Constitution. However, those fundamental rights may be restricted to protect other values that are guaranteed in the Constitution *(Satversme)*.

When assessing whether those restrictions were needed in a democratic society, the Court took into consideration that by allowing a person subject to security clearance to acquaint himself/herself with all the materials, the identity of the operative employees might be revealed, and as a result, those employees would not be able to do their duty. In such a case, the harm to state interests would be much greater than the limitation to the rights of a person.

The impugned provisions had to be interpreted in compliance with the Constitution and, in each particular case, to ensure (as much as possible) the realisation of the right to be heard. If the legal provisions were interpreted that way, the restriction on the right of a person was proportionate to the legitimate aim - the protection of state security.

The Court declared that the impugned provisions complied with Article 92 of the Constitution.

Cross-references:

- Cf. decisions in Cases no. 04-02(99), *Bulletin* 1999/2 [LAT-1999-2-002]; no. 2002-08-01; no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008].

In the decision the Court referred to the German Federal Constitutional Court, 08.07.1997, judgment in Case no. 1 BvR 1934/93, *BVerfGE* 96, 189 and to the following judgements of the European Court of Human Rights:

- *Golder v. the United Kingdom*, 21.02.1975, *Special Bulletin ECHR* [ECH-1975-S-001]; Vol. 18, *Series A of the Publications of the Court*;

- *Fogarty v. the United Kingdom*;

- *Leander v. Sweden*, 26.03.1987, *Special Bulletin ECHR* [ECH-1987-S-002]; Vol. 116, *Series A of the Publications of the Court*.

Languages:

Latvian, English (translation by the Court).

LAT-1998-2-004

10-06-1998 | 04-03(98) | On Conformity of the Cabinet of Ministers 1996 Resolution no. 148 and the Cabinet of Ministers 1997 Resolution no. 367 with the Law on the Determination of the Status of Politically Repressed Persons Suffered during the Communist and Nazi Regimes

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 10-06-1998 / **e)** 04-03(98) / **f)** On Conformity of the Cabinet of Ministers 1996 Resolution no. 148 and the Cabinet of Ministers 1997 Resolution no. 367 with the Law on the Determination of the Status of Politically Repressed Persons Suffered during the Communist and Nazi Regimes / **g)** *Latvijas Vestnesis* (Official Gazette), 172, 11.06.1998 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
3.3 **General Principles** - Democracy.

3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.11 **General Principles** - Vested and/or acquired rights.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Compensation, politically repressed persons / Deportation, compensation / Time-limit for application, reduction / Compensation, amount, limitation.

Headnotes:

Any State governed by the **rule of law** acknowledges the principle of trust in law. The principle requires that State institutions shall be consistent in their activities as regards normative acts passed by them and that they shall take into account trust in law, which could arise on the basis of a specific normative act.

Summary:

The Latvian SSR Council of Ministers adopted on 29 August 1989 Resolution no. 190, certifying the procedure by which property was to be restituted or its value compensated to citizens whose administrative deportation from Latvian SSR had been recognised as unfounded. The first paragraph of the Resolution provided that an application for restitution of property or compensation of its value must be made not later than 3 years from the date on which the Resolution about unfounded deportation had been passed. On 12 April 1995 the *Saeima* passed a new law on the determination of the status of politically repressed persons who suffered during the Communist and Nazi Regimes. The very first sentence of Article 9 established that «the State shall ensure restoration of politically repressed persons' rights in the area of civil, economic and social rights according to law».

On 15 February 1996 the law on the State Budget for 1996 was passed.

The third paragraph of the Transitional Provisions of the Law states that from 1 March 1996, applications for compensation from persons residing in the territory of the Republic of Latvia shall no longer be accepted.

On 23 April 1996, the Cabinet of Ministers passed Resolution no. 148 on the procedure by which property is to be restituted or its value compensated to persons whose administrative deportation from the Latvian SSR is recognised as unfounded (henceforth Resolution no. 148).

The second paragraph of the Resolution establishes that persons whose administrative deportation from the Latvian SSR is recognised as unfounded and who reside in the territory of the Republic of Latvia (or their heirs) shall have the issue of restitution of or compensation for property reviewed if they submit an application to the Council *(Dome)* of the Municipality of the territory where the persons lived before deportation. In accordance with the third paragraph of Transitional Provisions of the law on the State budget for 1996, such a claim had to be made within three years of the date of passing the Resolution concerning unfounded deportation but not later than 1 March 1996.

On 4 November 1997, the Cabinet of Ministers introduced amendments to Resolution no. 148 by means of Resolution no. 367, which provided that persons whose administrative deportation from the Latvian SSR had been recognised as unfounded and who reside in the territory of the Republic of Latvia (or their heirs) shall have the issue of restitution of or compensation for property reviewed if they have received documents certifying the fact that their administrative deportation was unfounded only after 1 March 1996.

The application was submitted by 22 deputies of the *Saeima*, who challenged Resolutions no. 148 and no. 367, considering that they were not in compliance with the law of 1995 on the determination of the status of politically repressed persons who suffered during the communist and Nazi Regimes. Article 10.1 of the law establishes that the State and local government institutions and their officials shall, upon receiving applications from politically repressed persons as well as from other interested persons, eliminate the consequences resulting from restrictions of civil, economic and social rights caused by the totalitarian regimes, and compensate material losses, physical and material damage, caused by these regimes.

The applicants also point out that in paragraph 10 of Resolution no. 148, the Cabinet of Ministers has groundlessly reduced the amount of compensation that the State had undertaken to pay to politically repressed persons in cases where there was no possibility of restituting the property, establishing the maximum amount of compensation as 2,000 lats for buildings and 500 lats for other property. In addition, Resolutions no. 148 and no. 367 created a situation whereby politically repressed persons who had received the certificate of rehabilitation before 1 March 1996 but who had not been able to submit an application to receive compensation before that date, had been denied the possibility of receiving compensation at all.

The Constitutional Court concluded that Article 1 of the Constitution (*Satversme)* establishes that Latvia shall be an independent democratic Republic. In a democratic state the legislative power belongs to the nation and the legislator - the *Saeima*. The executive power - the Cabinet of Ministers - has the right to pass resolutions only in cases foreseen by the law. Such resolutions shall not be at variance with the Constitution (*Satversme*) and other laws. The above follows from the principles of the rule of law and the separation of powers, which are considered to be the basis of the existence of a State governed by the rule of law.

Politically repressed persons trusted the procedure established in 1988 by which property was restituted or its value compensated. These persons planned their future on the basis of the rights endowed by certain normative acts. Due to Resolutions no. 148 and 367, passed by the Cabinet of Ministers, a number of politically repressed persons were denied the right of retrieving illegally confiscated property or receiving compensation for it as provided by law. Thus, the principles of justice and trust in law were violated.

By establishing the date upon which applications would no longer be accepted, Resolutions no. 148 and 367 are at variance with the law on the determination of the status of politically repressed persons who suffered during the Communist and Nazi Regimes which does not establish time limits for granting the status of a politically repressed person and restoring of the rights of such persons.

Paragraph 3 of the Transitional Provisions of the law on the State budget for 1996 only held up the acceptance of applications mentioned in the Resolution for a while and even then only on issues of compensation, not establishing restrictions on accepting those applications when there was a possibility of returning the property.

Evaluating the principles of justice, the rule of law, separation of powers and trust in law and taking into consideration the fact that the normative acts in question worsened the situation of politically repressed persons and unlawfully denied them their rights, the Constitutional Court decided that the above Resolutions are to be declared null and void from the moment of their adoption.

Languages:

Latvian, English (translation by the Court).

LTU-2004-1-001 26-01-2004 3/02-7/02-2 On the Republic of Lithuania Law on the Control of Alcohol

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26-01-2004 / **e)** 3/02-7/02-29/03 / **f)** On the Republic of Lithuania Law on the Control of Alcohol / **g)** *Valstybes Zinios* (Official Gazette), 15-465, 29.01.2004 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
3.18 **General Principles** - General interest.
3.25 **General Principles** - Market economy.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Advertising, commercial / Advertising, restriction / Alcohol, production, sale, regulation / Monopoly, unconstitutionality.

Headnotes:

Advertising is considered a specific kind of information, which is usually called commercial information. Alcohol and products containing alcohol are products of a special nature because their consumption may damage the health of people. Article 53.1 of the Constitution provides that the state shall take care of people's health and guarantee medical aid and services in the event of sickness. In accordance with the constitutional requirements, the state may restrict the advertising of alcohol: such restrictions must be established by the law; they must pursue and defend another constitutional value - in the case under review, the protection of human health.

The state has a duty to establish legal responsibility for violations of restrictions on the advertising of alcohol and the established procedure. However, this does not mean that the legislator may introduce penalties of any kind or fines of any size for violations of the laws regulating the procedure of production and realisation of the advertisement of alcoholic beverages. While establishing responsibility for violations of the restriction on the promotion of the trade of alcoholic beverages and the restriction on advertising alcohol, the legislator is bound by the constitutional principles of justice and a state governed by the **rule of law**, as well as by other constitutional requirements.

Production of alcoholic beverages is a sphere of economic activity. Although this economic activity has a very special character, the state and its institutions have the discretion to establish a special legal regime regulating the production and marketing of alcohol. However, they may not do so by choosing means inadequate to the objectives sought or means by which they would introduce a monopoly in the production and the marketing of these products. Such means would amount to an unfounded restriction on the freedom of economic activity and fair competition.

Summary:

The petitioner, the Vilnius Regional Administrative Court, applied (three applications by that Court were joined into one) to the Constitutional Court requesting it to investigate whether certain provisions of the Law on the Control of Alcohol and certain provisions of the Rules for Licensing the Production of Products Containing Alcohol as approved by the Government of Lithuania Resolution no. 67 "On the Approval of the Rules for Licensing the Production of Products Containing Alcohol" of 22 January 2001 were in conflict with the Constitution. In the opinion of the petitioner, in establishing restrictions on the advertisement of alcohol, in introducing a monopoly into the legal regulation, and in establishing disproportionate responsibility for violations of the restriction on the promotion of the trade of alcoholic beverages and the restriction on the advertisement of alcohol, the state violated requirements of the Constitution.

The Constitutional Court recalled that under the Constitution, human rights and freedoms may be restricted where the following conditions are met: it is done by the law; the restrictions are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally significant objectives; the restrictions do not deny the nature and the essence of

rights and freedoms; and the constitutional principle of proportionality is observed.

The freedom to express convictions, to obtain and impart information is one of the fundamental human freedoms. This freedom is not absolute. The provisions of Article 25.2 of the Constitution providing that a person must not be hindered from seeking, obtaining, and imparting information and ideas may not be construed as permitting the use of the freedom of information in a manner which would violate the values set out in Article 25.3 of the Constitution: health, honour and dignity, private life, or morals of a person, or for the protection of the constitutional order.

In accordance with constitutional requirements, the state may impose restrictions on the advertisement of alcohol, set out the responsibility for violations of the restriction on the promotion of the trade in alcoholic beverages and the restriction on the advertisement of alcohol. In the case under review, the restrictions on advertisement were adequate to the objective sought, i.e. they did not violate the requirements of proportionality and were of a partial nature.

According to the Constitution, the introduction of a monopoly is to be considered an unfounded granting of privileges to a certain economic entity, discrimination against other economic entities and the restriction of the latter's freedom of economic activity.

The Constitutional Court ruled that Article 44.4 (wording of 20 June 2002) of the Law on the Control of Alcohol to the extent that it does not provide for the consideration of the nature of a violation of the law and other circumstances when imposing a fine was in conflict with the constitutional principles of justice and a state governed by the rule of law. The Court ruled that the provision "the objective of the Law on the Control of Alcohol shall be [...] to establish legal grounds for the introduction of state monopoly on the production of products containing alcohol [...] and the granting of the right of state monopoly to produce [...] products containing alcohol specified in this Law to economic entities" of Article 2.1 (wording of 18 April 1995), Item 2 (wording of 18 April 1995) of Article 3.1, Article 4.2 (wording of 10 December 1998) and Article 13 (wording of 18 July 2000) of the Law on the Control of Alcohol as well as Items 7 and 9 (wording of 22 January 2001) of the Rules for Licensing the Production of Products Containing Alcohol as approved by Government of the Republic of Lithuania Resolution no. 67 "On the Approval of the Rules for Licensing the Production of Products Containing Alcohol" of 22 January 2001 were in conflict with Articles 29, 46.1 and 46.4 of the Constitution. The other impugned provisions of the Law on the Control of Alcohol were held to be in accordance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-2003-2-008

10-06-2003 13/02-22/0 On the regulation concerning the imposition of the criminal penalty

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10-06-2003 / **e)** 13/02-22/02 / **f)** On the regulation concerning the imposition of the criminal penalty / **g)** *Valstybes Zinios* (Official Gazette), 57-2552, 13.06.2003 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.2.3 **Sources of Constitutional Law** - Categories - Unwritten rules - Natural law.
3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
4.5.2 **Institutions** - Legislative bodies - Powers.
5.3.13.1.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Criminal proceedings.

Keywords of the alphabetical index:

Punishment, penal, just / Punishment, individualised / Count, power of appraisal, restriction.

Headnotes:

The principle of natural justice consolidated in the Constitution presupposes that punishments established by penal laws must be just. The constitutional principles of justice and a state governed by the **rule of law** imply, *inter alia,* that the means used by the state must be proportionate to the objective sought. The establishment is not permitted of punishments or the severity of punishments for criminal offences that are obviously inappropriate for those criminal offences and the purpose of the punishment.

The legislator, having constitutional powers to set out punishments and the severity of those punishments for criminal offences, has a duty to set the maximum limits on the punishments for particular criminal offences. Failure to do so would create a situation embodying the pre-requisites for the imposition of unreasonably severe punishments and the violation of human rights and freedoms. According to the Constitution, the legislator may also establish minimum punishments for certain criminal offences.

When the legislator, in an article laying down the constitutive elements of a particular criminal offence, provides for a punishment that is severe due to the length of the minimum term of imprisonment for that criminal offence, the legislator must also ensure that a legal provision exists giving the Court that imposes punishment a discretion to take into account all circumstances of the case relevant to mitigation of sentence, including those which have not been *expressis verbis* established by the law, and to impose a less severe punishment than that provided for by the law.

Under the Constitution, it is impossible to have a legal regulation of the matter (punishments or their severity) in the penal laws establishing that a court, when taking into account all circumstances of a case and applying the penal laws, would not be able to individualise the punishment imposed on a particular person for the commission of a particular criminal offence.

Summary:

The petitioner, the Court of Appeal of Lithuania, applied to the Constitutional Court requesting it to examine whether or not Article 45.4 (wording of 2 July 1998) and the minimum punishment of five years' imprisonment laid down by Article 312.3 of the Criminal Code (hereinafter - CC) (wording of 3 February 1998) were in conflict with Article 31.2 of the Constitution and the constitutional principle of a state governed by the rule of law. A second petitioner, the *Panevezys Regional Court,* applied to the Constitutional Court requesting it to examine whether or not Article 45.4 CC (wording of 2 July 1998) was in conflict with Article 29.1 and Article 31.2 of the Constitution.

The Court of Appeal of Lithuania stressed that in the application of Article 312.3 CC (wording of 3 February 1998), the Court was obliged to impose a punishment of not less than five years' imprisonment and a fine on a person who had committed a particular criminal offence, even though the imposition of such a severe punishment was not always in line with the principle of justice. Article 45 CC, under certain conditions and in certain situations enables the Court to avoid imposing a clearly unjust punishment and enables it to impose a less severe punishment than the one provided for by the law, where a particular sanction does not allow it to take into account the nature of the crime and the person who committed it. However, Article 45.4 CC (wording of 2 July 1998) provided that the criminal offences in question did not fall under Article 45.2 CC, which would have permitted the imposition of less severe punishment than that provided for in the law. The petitioner was of the opinion that singling out certain crimes so as to prohibit the imposition of a less severe punishment than the one provided for in the particular sanction (i.e. application of Article 45 CC) fettered the court's discretion to examine the case justly and to individualise the punishment.

The Constitutional Court considered that under the Constitution, it would be impossible to have a legal regulation of the matter (punishments or their severity) in the penal laws establishing that a court, when taking into account all circumstances of a case and applying the penal laws, would not be able to individualise the

punishment imposed on a particular person for the commission of a particular criminal offence.

The Court ruled that Article 45 CC (wording of 2 July 1998) to the extent that it restricted the right of the Court, when taking into account all circumstances relevant to mitigation of sentence, including those not specified by the law, to impose a less severe punishment than the one provided for by Article 312.3 CC (wording of 3 February 1998) was in conflict with Article 31.2 of the Constitution as well as the constitutional principle of a state governed by the rule of law. The Court also ruled that the provision of Article 312.3 CC (wording of 3 February 1998) "shall be punished by imprisonment from five years (...)" was not in conflict with Article 31.2 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-2002-3-015

23-10-2002 | 36/2000 | On the Law on the Provision of Information to the Public

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 23-10-2002 / **e)** 36/2000 / **f)** On the Law on the Provision of Information to the Public / **g)** *Valstybes Zinios* (Official Gazette), 104-4675, 31.10.2002 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
5.2 **Fundamental Rights** - Equality.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.24 **Fundamental Rights** - Civil and political rights - Right to information.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.

Keywords of the alphabetical index:

Information, right to seek, obtain and disseminate / Informant, identity, disclosure / Public person, media information.

Headnotes:

When establishing by law the guarantees of freedom of the media, the legislature must heed the imperative of an open, just and harmonious civil society entrenched in the Constitution, as well as the constitutional principle of the **rule of law**, and must not violate the rights and freedoms of others.

By laying down the right of a producer and an imparter, an owner of the producer and/or imparter of public information and of a journalist, not to disclose a source of information even in cases where, in a democratic state upon a decision of a court, disclosure of the source is necessary because of vitally important or other interests of society which are of the utmost importance, or to ensure that the constitutional rights and freedoms of other persons are protected, and that justice be administered, Article 8 of the Law on the Provision of Information to the Public violates Articles 25.3, 25.4 and 29 of the Constitution, and is contrary to the principle of the **rule of law**, since non-disclosure of the source might cause much graver effects than its disclosure.

The media may inform the public about the private life of persons involved in social and political activities without their consent in so far as the personal characteristics, behaviour and particular circumstances of that person's private life may be of importance to public affairs. A person involved in social and political activities cannot but anticipate greater attention being paid to him by the public and the media.

Summary:

The petitioner - a group of members of the Parliament of Lithuania *(Seimas)* - applied to the Constitutional Court requesting that it determine whether Article 8 of the Law on the Provision of Information to the Public (the Law) complied with Article 29.1 of the Constitution and whether Article 14.3 of that law complied with Article 22 of the Constitution.

The petitioner emphasised that Article 8 of the Law consolidated the right of a producer and an imparter, an owner of the producer and/or imparter of public information and a journalist to keep, without reservations, secret the source of information and not disclose it. The petitioner doubted whether the norm laying down such an absolute right complied with Article 29.1 of the Constitution, since similar rights in other laws are restricted by the reservation that the data, information or other facts must be disclosed where the court, prosecutor's office and other state institutions of law and order demand so in connection with existing criminal or civil cases under their jurisdiction or powers, and in other cases provided for by law. In the opinion of the petitioner, Article 8 of the Law placed the producer, imparter and other entities named therein in a privileged position; they were granted more rights than other natural and legal persons.

The petitioner argued that Article 14.3 of the Law gave very vague reasons for which the principle of the inviolability of an individual's private life, entrenched in Article 22 of the Constitution, may be disregarded when publishing information about a person's private life; those reasons were subject to various interpretations.

The Constitutional Court recalled that the constitutional freedom to seek, obtain and impart information and ideas unhindered was one of the fundamentals of an open, just, and harmonious civil society and law-governed state. That freedom is an important pre-condition for the implementation of various rights and freedoms of the person which are entrenched in the Constitution, since most constitutional rights and freedoms of a person can only be adequately implemented if that person has the right to seek, obtain and impart information unhindered. The Constitution guarantees and safeguards the interest of the public to be informed.

Freedom of the media stems from Article 25 of the Constitution and the other provisions of the Constitution consolidating and guaranteeing an individual's freedom to seek, obtain and impart information. Under the Constitution, the legislature has a duty to establish by law the guarantees of the freedom of the media.

The Constitutional Court held that Article 8 of the Law on the Provision of Information to the Public conflicted with Articles 25.3 and 25.4 of the Constitution and the constitutional principle of the rule of law in so far as Article 8 laid down that the producer and imparter, the owner of the producer and/or imparter of public information and the journalist had the right to keep secret and not disclose the source even in cases where in a democratic state, upon a decision of the court, disclosure of the source is necessary because of vitally important or other interests of society which are of utmost importance, to ensure that the constitutional rights and freedoms of persons be protected, and that justice be administered.

Article 22 of the Constitution consolidates the inviolability of the private life of an individual. The right of an individual to privacy encompasses the inviolability of private, family and home life, of honour and reputation, physical and psychological inviolability of persons, secrecy of personal facts and prohibition to publicise any confidential information obtained, etc.

The right to the inviolability of private life is not absolute. Under the Constitution, constitutional rights and freedoms of the individual may be restricted where the following conditions are met: this is done by law; the restrictions are necessary in a democratic society in an attempt to protect the rights and freedoms of other persons and the values entrenched in the Constitution as well as constitutionally important objectives; the restrictions do not deny the nature and essence of the rights and freedoms; and, the constitutional principle of proportionality is followed.

The Constitutional Court emphasised that the personal characteristics, behaviour and particular

circumstances of the private life of persons participating in social and political activities may be of importance to public affairs. The interest of the public to know more about those persons than about others is constitutionally grounded. The said interest would not be ensured if in every particular case, publishing the information of public importance about the private life of a person participating in social and political activities required the consent of that person. The Court ruled that Article 14.3 of the Law on the Provision of Information to the Public complied with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-2002-2-012 02-07-2002 32/2000 On soldiers' right to appeal to court

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 02-07-2002 / **e)** 32/2000 / **f)** On soldiers' right to appeal to court / **g)** *Valstybes Zinios* (Official Gazette), 69-2832, 05.07.2002 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.20 **General Principles** - Reasonableness.
4.5.2 **Institutions** - Legislative bodies - Powers.
4.11.1 **Institutions** - Armed forces, police forces and secret services - Armed forces.
5.1.1.4.4 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Military personnel.
5.2 **Fundamental Rights** - Equality.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Army, military service, dismissal / Dismissal, right to appeal, extra-judicial dispute-settlement procedure.

Headnotes:

Under the Constitution, the law must provide for the possibility for all disputes concerning violations of the rights or freedoms of individuals to be decided in court. An out-of-court dispute settlement procedure may also be provided for. However, it is not permissible to provide for a system that denies the right of an individual who considers that his rights or freedoms are being violated to defend his rights and freedoms in court.

In its ruling of 8 May 2000, the Constitutional Court held that an individual's right to seek the protection by the courts of a violated right is guaranteed regardless of the legal status of the person and that the protection of the courts must extend to an individual's violated rights and legitimate interests irrespective of whether these rights are directly established in the Constitution.

In accordance with Article 109.1 of the Constitution, in the Republic of Lithuania, the courts shall have the exclusive right to administer justice. This article must be read together with Article 30.1 of the Constitution, which guarantees the right of any person to appeal to a court concerning the protection of his or her violated rights. It must also be read together with the constitutionally enshrined principle of a state governed by the **rule of law** and with the inherent right of individuals to justice.

Summary:

The petitioner - the Higher Administrative Court - applied to the Constitutional Court seeking a determination whether Article 48.2 of the Law on the Organisation of the National Defence System and Military Service ("the Law") was in compliance with Articles 30.1 and 109.1 of the Constitution. Article 48.2 of the Law provided

that, in cases of dismissal from professional or voluntary military service based on the provisions of Article 38.1 or 38.2.10 and 38.2.12 of the Law, when the service contract with the professional or voluntary soldier had to be terminated, an appeal could be lodged with a court only insofar as it concerned a violation of the procedure for dismissal laid down by law. In the opinion of the petitioner, the impugned provision restricted the right of individuals, enshrined in Article 30.1 of the Constitution, to appeal to a court, and was in breach of Article 109.1 of the Constitution, under which, in the Republic of Lithuania, the courts shall have the exclusive right to administer justice.

The Constitutional Court emphasised that organisational relations within the national defence system and military service have their own peculiarities. Taking account of these peculiarities, it is permissible to establish by law various means of resolving disputes regarding violations of rights and freedoms, including out-of-court procedures for the settlement of such disputes. However, the peculiarities of the organisational relations within the national defence system and military service could not justify the denial of the constitutional right of individuals to appeal to a court to defend their rights and freedoms.

The Court found that under Article 48.2 of the Law, soldiers were prohibited from appealing to a court concerning the reasonableness of their dismissal from military service. This constituted a violation of the constitutional right of individuals to appeal to a court. The Court further held that the right of persons to justice was infringed and the opportunities of courts to administer justice were restricted. Thus Article 109.1 of the Constitution and the constitutionally enshrined principle of a state governed by the rule of law were violated.

The Court ruled that the impugned provised was in conflict with Articles 30.1 and 109.1 of the Constitution and the constitutional principle of a state governed by the rule of law.

Cross-references:

- Ruling of 08.05.2000 (Cases nos. 12/99, 27/99, 29/99, 1/2000, 2/2000), *Bulletin* 2000/2 [LTU-2000-2-005].

Languages:

Lithuanian, English (translation by the Court).

LTU-2001-1-001 11-01-2001 7/99-17/99 On the retroactive validity of laws

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 11-01-2001 / **e)** 7/99-17/99 / **f)** On the retroactive validity of laws / **g)** *Valstybes Zinios* (Official Gazette), 5-143, 17.01.2001 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.15 **General Principles** - Publication of laws.
5.3.38.1 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Criminal law.

Keywords of the alphabetical index:

Lex benignior retro agit.

Headnotes:

Article 7.2 of the Constitution provides that only laws which are promulgated shall be valid. This constitutional provision means that laws are not valid and may not be applied unless they are officially promulgated. The official promulgation of laws in pursuance with the procedure established in the Constitution and laws is a necessary condition for the validity of laws to ensure subjects of legal relations know what laws are valid, the

content of those laws, and therefore whether they might follow those laws.

Article 7.2 of the Constitution also reflects the legal principle that the validity of promulgated laws is directed to the future and that these laws are not retroactively valid *(lex retro non agit)*. Thus, laws are applied to facts and effects which take place after the laws come into effect. The requirement that the validity of promulgated laws be directed to the future and that these laws should not be retroactively valid is an important precondition of legal certainty and an essential element of the **rule of law** and a law-governed state.

The legal principle of non-retroactively is linked with the constitutional principles of justice and humanity. Laws abolishing punishment or mitigating responsibility for a deed have retroactive validity *(lex benignior retro agit)*.

Summary:

The petitioners - the Panevezys Regional Court and the Panevezys City District Court - doubted whether Article 7.2 of the Criminal Code was in conformity with the Constitution. The article provides that "a law, abolishing the criminality of a deed, mitigating punishment or otherwise ameliorating the legal situation of a person who has committed the deed, shall be retroactively valid, i.e. it shall be applicable to persons who had committed respective deeds before the said law went into effect, as well as to persons serving the sentence and to those who have a previous record".

The Constitutional Court held that the provisions of Article 7 of the Criminal Code are in line with provisions of international law whereby no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. The Constitutional Court ruled that Article 7.2 of the Criminal Code was in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-2000-3-012	06-12-2000	6/99, 23/99, 5/2000, 8/2000	On taxes

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 06-12-2000 / **e)** 6/99, 23/99, 5/2000, 8/2000 / **f)** On taxes / **g)** *Valstybes Zinios* (Official Gazette), 105-3318, 08.12.2000 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.2.3 **Sources of Constitutional Law** - Categories - Unwritten rules - Natural law.
3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.

Keywords of the alphabetical index:

Tax, fine / Fine, minimum.

Headnotes:

Although the Constitution grants Parliament *(Seimas)* the competence to establish state taxes, as well as the

legal responsibility for violations of tax laws, it does not allow the legislator to establish any type of legal responsibility, penalty or fine for violations of tax laws. By establishing sizes of fines for violations of tax laws, the legislator is bound by the constitutional principles of justice and the **rule of law**, as well as other constitutional requirements.

The principles of justice and the **rule of law** enshrined in the Constitution are universal principles and must be followed both in law-making and law enforcement. All state institutions must only act on the basis and in pursuit of law; human rights and freedoms must be secured and natural justice must be respected.

The constitutional principles of justice and the **rule of law** also mean there must be a fair balance (proportionality) between the objective sought and the means to attain this objective, between violations of law and penalties established for these violations. These principles do not permit the establishment of penalties for violations of law, including the amounts of fines, which would clearly be disproportionate to the violation of law and the objective sought to be achieved. Fines for violations of tax laws must be only of the amount necessary to achieve the legitimate and generally important objective, i.e. to secure the fulfilment of the constitutional duty to pay taxes.

Summary:

The petitioners - certain Members of Parliament and the Higher Administrative Court - questioned whether some norms of the Law on Tax Administration were in conformity with the Constitution of the Republic. A group of Members of Parliament also requested the investigation of whether Articles 1 and 2 of the Law on Recognition of Article 40 as Null and Void and Amendment of Article 251 of the Code of Administrative Violations of Law were compatible with the Constitution.

The Constitutional Court emphasised that two principles for determining the amount of the fine provided for in Article 50.3.1 and 50.3.2 of the Law on Tax Administration contradicted each other. Article 50.3.1 established the fine as a certain proportion (expressed as 10% or a one-tenth fine) whilst Article 50.3.2 established it as a certain strictly determined sum. The provisions contradicted each other because regardless of what sum is equivalent to 10% or a one-tenth fine, in all cases the fine may not be less than 20,000 or 50,000 litas respectively.

The provisions meant that for the same violation of laws a fine imposed on certain economic entities, which may be higher than 20,000 or 50,000 litas respectively, might not constitute more than 10% of the income (receipts) received during the previous 12 months, while the fine of 20,000 or 50,000 litas imposed respectively on other economic entities would constitute much more than 10% of the income received during the previous 12 months. Such a fine may even be much higher than the overall income received during the previous 12 months.

A similar situation occurs when under Article 50.3.1 and 50.3.2 of the Law on Tax Administration a one-tenth fine is imposed in cases of hidden income, false value of goods and unregistered payments for employees due to fraudulent book-keeping. The fine might be higher than 20,000 or 50,000 litas respectively without constituting more than the said one-tenth sum, while the fine of 20,000 or 50,000 litas imposed on other economic entities may exceed the said one-tenth sum. Such a fine might be many times larger than the said one-tenth sum.

The Constitutional Court ruled that such legal regulation is incompatible with the principles of justice including the principle of proportionality and the rule of law established in the Constitution.

The Constitutional Court also ruled that the other disputed norms were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-2000-3-010	18-10-2000	29/98, 16/99, 3/2000	On the privatisation

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18-10-2000 / **e)** 29/98, 16/99, 3/2000 / **f)** On the privatisation / **g)** *Valstybes Zinios* (Official Gazette), 88-2724, 20.10.2000 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
3.9 **General Principles** - Rule of law.
4.6.3 **Institutions** - Executive bodies - Application of laws.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
4.10.8.1 **Institutions** - Public finances - State assets - Privatisation.

Keywords of the alphabetical index:

Privatisation, procedure / Shareholder, share, transfer / Company, reorganisation, shares.

Headnotes:

The Parliament *(Seimas)* and all those involved in the legislative process must ensure that all drafted and adopted legal acts are compatible with the Constitution. This is one of the most important means of securing constitutional order and a fundamental requirement of the **Rule of law**.

Summary:

On 29 September 1998, the Parliament adopted the Law on the Reorganisation of the Joint-Stock Companies *("Butinges nafta", "Mazeikiu nafta"* and *"Naftotiekis")*, the Law on Supplementing and Amending Article 5 of the Law on Tax Administration, the Law on Supplementing Article 12 of the Law on Foreign Capital Investment in the Republic of Lithuania and the Resolution on the Recognition of a Strategic Investor. The Law on the Reorganisation of the Joint-Stock Companies provides for the procedure for reorganisation of the joint-stock companies. The law further provides for the conditions and procedure for investments into the company after reorganisation and the requirements for owners of blocs of shares. The other aforesaid laws and the resolution of Parliament are linked with the Law on the Reorganisation of the Joint-Stock Companies.

Some Members of Parliament filed a petition with the Constitutional Court requesting the investigation of whether the content and adoption of the aforementioned legal acts were in compliance with the Constitution. In addition, the Constitutional Court was asked to investigate whether Parliament's resolution was in compliance with the Constitution and the Law on the Basics of National Security.

The Constitutional Court ruled that:

1. the provision of Article 3.4 of the Law on the Reorganisation of the Joint-Stock Companies that the Government, in the agreements with the strategic investor and/or the joint-stock company, has the right to assume basic property liabilities in the name of the state for the strategic investor and/or the joint-stock company conflicts with Articles 5.1 and 128.1 of the Constitution;

2. the provision of Article 3.4 of the Law on the Reorganisation of the Joint-Stock Companies that the Government, in the agreements with the strategic investor and the joint-stock company, has the right to assume basic property liabilities in the name of the state, even when the investor and/or the joint-stock company are responsible for the losses, conflicts with Article 46.3 of the Constitution and with the Rule of law

enshrined in the Constitution;

3. the provision of Article 3.4 of the Law on the Reorganisation of the Joint-Stock Companies that the Government, in the agreements with the strategic investor and/or the joint-stock company, has the right to assume basic property liabilities in the name of the state, including recovery of losses, to the extent that the Government has the right to commit itself to covering losses even when such losses are incurred due to the adoption of laws enforcing constitutional norms and/or protecting the values laid down in the Constitution, conflicts with Article 4 of the Constitution and with the rule of law enshrined in the Constitution;

4. the provision of Article 4.2 of the Law on the Reorganisation of the Joint-stock Companies that the state, and by a decision of the Government the strategic investor, shall have priority in the acquisition of shares sold by or transferred from shareholders holding not less than one percent of shares of the joint-stock company conflicts with Article 23 of the Constitution to the extent that the right of the shareholders to transfer their shares is restricted;

5. the provision giving the Government the right to prolong the tax freeze on strategic investors for up to 10 years in Article 5.3 of the Law on Tax Administration conflicts with Articles 5.1.15, 67 and 127.3 of the Constitution, and with the rule of law enshrined in the Constitution.

The Constitutional Court also ruled that the other disputed provisions were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-2000-2-005	08-05-2000	12/99, 27/99, 29/99, 1/2000, 2/2000	On undercover operations involving the simulation of a criminal act

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08-05-2000 / **e)** 12/99, 27/99, 29/99, 1/2000, 2/2000 / **f)** On undercover operations involving the simulation of a criminal act / **g)** *Valstybes zinios* (Official Gazette), 39-1105, 12.05.2000 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.3.2.2 **Sources of Constitutional Law** - Categories - Case-law - International case-law - Court of Justice of the European Communities.
3.9 **General Principles** - Rule of law.
4.4.4.1.1.1 **Institutions** - Head of State - Status - Liability - Legal liability - Immunity.
4.5.11 **Institutions** - Legislative bodies - Status of members of legislative bodies.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
5.3.13.23.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to remain silent - Right not to incriminate oneself.

Keywords of the alphabetical index:

Police, undercover operation / Agent provocateur.

Headnotes:

The Preamble to the Constitution, which states that the Lithuanian nation strives for an open, just and harmonious civil society and a state governed by the **rule of law**, pre-supposes that every individual and society as a whole must be safe from unlawful infringements. One of the duties of the state and one of its priority tasks is to ensure such safety. Therefore the state is compelled to implement various specific lawful means permitting the curbing of crime.

One of such lawful means is to undertake undercover police operations involving the simulation of a criminal act. This means undertaking authorised acts exhibiting criminal characteristics aimed at protecting the key interests of the state, the public or an individual. This method is a special form of operational activities. The undercover participants in such activities perform actions which formally correspond to the definitions of particular crimes. Using this method allows for more favourable conditions to be created for the detection or investigation of serious or complex crimes. Certain crimes, e.g. cases of corruption, would be extremely difficult to detect without using such methods.

Summary:

The petitioners - the Vilnius Regional Court and the Vilnius City Court of the First District - questioned whether undercover police operations involving the simulation of a criminal act could be carried out at all. The petitioners maintain that the Law on Operational Activities does not define the contents, intensity, mechanism of accomplishing such actions, as well as other issues: all this is left for the person and officers conducting the activities. Therefore, the disputed provisions of the law do not protect the person who is the object of such activities from provocation and active inducement. Furthermore, the petitioners were of the opinion that such methods might only be used with prior authorisation by a court or a judge, but not by the Prosecutor General or the Deputy Prosecutor General designated by him.

The group of Parliament *(Seimas)* members that also petitioned the Court argued that under the meaning of Article 11 of the law undercover police operations involving the simulation of a criminal act may be used against any person. The law therefore restricts the guarantees of personal immunity conferred on certain categories of persons. Under the law, such operations may be used against the President of the Republic as well as parliament members, whereas the provisions of the Constitution regarding immunity of these persons guarantee their protection against possible (unlawful) provocation. In the opinion of the petitioner, Article 11 of the law unreasonably narrows the immunity of the President of the Republic and of parliament members.

The Constitutional Court emphasised that such activities may only be carried out with the aim of "connecting oneself" to permanent or continuing crimes. Such criminal deeds continue without the efforts of participants in undercover police operations. The undercover participants only imitate the actions of preparation of a crime or those of a crime which is being committed. It is not permitted for undercover police operations to incite or provoke the commission of a new crime nor to incite the commission of a criminal deed which was merely prepared and only later terminated by an individual. Thus, under the law the actions performed by police in undercover operations are held to be lawful where the established limits of such actions are not overstepped. Disregard of these limits established in the law, provocation of the commission of a crime or any other abuse by means of such operations makes them unlawful. Thus the Court ruled that this type of action may be used.

The Constitutional Court also noted that according to the case-law practice of the European Court of Human Rights, in themselves secret methods of detection of crimes and offenders do not violate Article 8 ECHR (43). It emphasised that in its Judgment in the case of Klass and others vs. Germany of 6 September 1978, the European Court of Human Rights considered that the use of secret means is not incompatible with Article 8 ECHR, since it is the fact of not informing the individual that ensures the efficacy of this measure.

The Constitutional Court also noted that immunity of the President of the Republic is very broad while he or she is in office. Thus, the Constitutional Court concluded that no forms of police operations, including

undercover operations involving the simulation of a criminal act, may be used against the President of the Republic. The provisions of the Constitution do not, however, prohibit the enactment of legal regulations providing for undercover and similar police operations to be used against other persons including members of the parliament.

Languages:

Lithuanian, English (translation by the Court).

LTU-2000-1-001 07-01-2000 11/99 On the right of assembly

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 07-01-2000 / **e)** 11/99 / **f)** On the right of assembly / **g)** *Valstybes Zinios* (Official Gazette), 3-78, 12.01.2000 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.16 **General Principles** - Proportionality.
3.22 **General Principles** - Prohibition of arbitrariness.
4.6.3 **Institutions** - Executive bodies - Application of laws.
4.8 **Institutions** - Federalism, regionalism and local self-government.
4.8.6.3 **Institutions** - Federalism, regionalism and local self-government - Institutional aspects - Courts.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.28 **Fundamental Rights** - Civil and political rights - Freedom of assembly.

Keywords of the alphabetical index:

Meeting, permanent places, designation.

Headnotes:

Under Article 36.1 of the Constitution citizens may not be prohibited or hindered from assembling in unarmed peaceful meetings. The constitutional establishment of the right of assembly means that it is treated as one of the fundamental human rights and values in a democratic society and is an indivisible element of the democratic system. It is an important element in striving towards an open, just and harmonious civil society and a state governed by the **rule of law** which are the main aims of the Lithuanian nation as established in the preamble of the Constitution.

Summary:

Article 6.2 of the Law on Meetings provides that local governments may designate permanent places or premises for meetings.

The petitioner - the Kaunas Regional Court - doubted whether above mentioned norm was in compliance with the Constitution.

The Constitutional Court noted that the legislator enjoys discretion when establishing the procedure for the implementation of the right of assembly. However, it stated that he may not deny the essence of this right because any interference of the State with the exercise of the right of assembly, as with other rights and freedoms, is only recognised as lawful and necessary to the extent that it respects the principle of proportionality. Where any public place or publicly-used buildings are chosen for the meeting, the place for the meeting must, in accordance with the procedure established by Law, be agreed with the chief officer of the executive body of the local government council or his authorised representative.

The Constitutional Court emphasised that this officer or his authorised representative, when he adopts a decision refusing to authorise the holding of a meeting in the proposed place and manner and at the proposed time, is bound by the bases of the restriction of the freedom of assembly as indicated in Article 36.2 of the Constitution. In adopting such a decision, he must present clear evidence showing how the meeting will violate the security of the State or the community, public order, public health or morals, or the rights and freedoms of others. On the other hand, the Constitutional Court also noted that local governments may establish permanent places or premises for meetings. In such cases the Law provides for a simplified procedure for the implementation of the right of assembly.

The Constitutional Court drew the conclusion that the disputed provisions of the Law whereby local governments may establish permanent places or premises for meetings may not be interpreted as granting the right for local governments not to allow people to assemble in peaceful meetings in places which are not designated by the local government. The Court also noted that it is not correct to interpret the provision of the Law as prohibiting citizens from assembling in peaceful meetings in other places which are not established for that purpose by the local government.

The Constitutional Court ruled that Article 6.2 of the Law on Meetings is in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-1999-3-014 21-12-1999 16/98 The Law on Courts

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 21-12-1999 / **e)** 16/98 / **f)** The Law on Courts / **g)** *Valstybes zinios* (Official Gazette), 109-3192, 24.12.1999 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** - Separation of powers.
4.4.1.3 **Institutions** - Head of State - Powers - Relations with judicial bodies.
4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
4.7.4.1.2 **Institutions** - Judicial bodies - Organisation - Members - Appointment.
4.7.4.1.5 **Institutions** - Judicial bodies - Organisation - Members - End of office.
4.7.4.1.6 **Institutions** - Judicial bodies - Organisation - Members - Status.
4.7.4.1.6.2 **Institutions** - Judicial bodies - Organisation - Members - Status - Discipline.
4.7.5 **Institutions** - Judicial bodies - Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judiciary, independence / Judiciary, self government / Judge, dismissal.

Headnotes:

The independence of judges and courts is one of the essential principles of a democratic state governed by the **rule of law**. The role of the judiciary in such a state is, while administering justice, to ensure the implementation of the law expressed in the Constitution, laws and other legal acts, to guarantee the **rule of law** and to protect human rights and freedoms.

On the other hand, judges and courts are not sufficiently independent if the independence of courts (the institutions of judicial power) is not ensured. According to the principle of separation of powers, all powers are autonomous, independent and capable of counterbalancing each other. A further reason why the judiciary may not be dependent on other powers is the fact that it is the only power formed on a professional but not

political basis. It is only when the judiciary is autonomous and independent of the other powers that it exercises its true function, which is the administration of justice.

Summary:

The petitioner - a group of members of parliament (Seimas members) - contested the compliance with the Constitution of the provisions of the Law on Courts regulating the relations of courts with other state institutions or officials.

The Court noted that Article 84.11 of the Constitution provides that the President of the Republic shall propose Supreme Court judge candidates to the parliament, and, upon the appointment of all the Supreme Court judges, recommend from among them the Supreme Court Chairperson to the parliament; appoint, with the approval of the parliament, judges of the Court of Appeal, and from among them, the Court of Appeal Chairperson; appoint judges and chairpersons of district and local courts, and change their places of office; in cases provided by law, propose the dismissal of judges to the parliament. Those provisions establishing the powers of the President in the sphere of the appointment and dismissal of judges are linked with Article 112.5 of the Constitution, wherein it is prescribed that a special institution of judges provided for by law shall submit recommendations to the President concerning the appointment of judges, as well as their promotion, transferral or dismissal from office. Under Article 30 of the Law on Courts, these functions are performed by the Council of Judges. Taking account of the procedure for the formation of courts established in the Constitution, as well as the constitutional regulation of the relations of the President with the special institution of judges, one is to conclude that the special institution of judges mentioned in Article 112.5 of the Constitution must give recommendations to the President concerning all questions as to the appointment of judges, their proffessional career and their dismissal from office. The recommendation of this institution gives rise to legal effects: where there is no such recommendation, the President may not adopt decisions on the appointment, promotion, transfer or dismissal of judges (33).

Thus, according to the Constitution, the special institution of judges not only helps the President to form courts but it also serves as a counterbalance to the President, who is a part of the executive branch of power, in the area of the formation of the body of judges. On the other hand, the special institution of judges provided for under Article 112.5 of the Constitution is to be interpreted as an important element of self-government of the judiciary, which is an independent state power (33).

However, the Law on Courts provided that the President may exercise his or her constitutional rights only if there was a proposal by the Minister of Justice. The Court therefore ruled that these provisions contradicted the Constitution (33).

In the ruling referred to, the Constitutional Court examined the provisions under which deputy chairpersons or court division chairpersons shall be appointed by the Minister of Justice; court division chairpersons of the Court of Appeal shall be appointed by the Minister of Justice from among the appointed judges; court division chairpersons of the Court of Appeal and deputy chairpersons or court division chairpersons of other courts shall be dismissed from office by the Minister of Justice; the number of judges in the divisions of civil and criminal cases of district courts and the Court of Appeal shall be set by the Minister of Justice on the proposal of the Director of the Department of Courts under the Ministry of Justice; and the provisions under which a judge of a local or district court, of the Court of Appeal or the Supreme Court of Lithuania, if he or she so agrees, may, by a decree of the President of the Republic, be delegated for a term of up to one year to the structures of the Ministry of Justice or those of the Department of Courts and for the term of the delegation the powers of the delegated judge shall be suspended. It also examined the competence of the Minister of Justice to arrange for the financial supply of local, district courts and the Court of Appeal. The Court ruled that all of these provisions contradicted the Constitution (33).

The Court also ruled that the following provisions were in conflict with the Constitution: those providing for a proposal by the Minister of Justice regarding the reappointment of judges after their five-year term of office has expired; those providing for a proposal by the Minister of Justice regarding the appointment of judges to the Court of Honour of Judges; those under which disciplinary action against the chairperson of a local or district court or the Court of Appeal, their deputies, division chairpersons and other judges may be instituted

by the Minister of Justice on the proposal of the Director of the Department of Courts or on his own initiative; and those under which the judge against whom disciplinary action has been instituted may be removed from office on the proposal of the Minister of Justice until the outcome of the case becomes clear (33).

Languages:

Lithuanian, English (translation by the Court).

LTU-1999-2-008 11-05-1999 3/99-5/99 on impeachment

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 11-05-1999 / **e)** 3/99-5/99 / **f)** on impeachment / **g)** *Valstybes Zinios* (Official Gazette), 42-1345, 14.05.1999 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

1.3.4.7.4 **Constitutional Justice** - Jurisdiction - Types of litigation - Restrictive proceedings - Impeachment.
3.9 **General Principles** - Rule of law.
4.5.3.4.3 **Institutions** - Legislative bodies - Composition - Term of office of members - End.
4.5.11 **Institutions** - Legislative bodies - Status of members of legislative bodies.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Official, dismissal / Mandate, revocation *in absentia*.

Headnotes:

One of the essential features of the **rule of law** is the protection of the rights and freedoms of individuals. The norms regulating impeachment must not only create an opportunity to remove a person from office or to revoke his mandate but also an opportunity to ensure that person's rights. Impeachment proceedings can be considered to be in line with the principles of the **rule of law** when they are fair. It means that the individuals concerned must be equal before both the law and the institutions carrying out impeachment and have the right to be heard and a legally guaranteed opportunity to defend their rights. If the principles of a fair judicial process were not followed in the course of impeachment, this would go against the requirements of the **rule of law**.

Summary:

On 22 December 1998, the *Seimas* of the Republic of Lithuania amended its Statute. Part VIII Impeachment Proceedings (Articles 227-260) of the amended Statute regulates the bases and procedure for carrying out impeachment proceedings at the *Seimas*. Along with the other amendments, the procedure for impeachment proceedings was changed as well. The Statute was supplemented by Chapter 40: "Procedure for Impeachment at the *Seimas* following receipt of a Copy of a Court Judgment" (Articles 259 and 260). Article 259 of the Statute regulates the procedure for impeachment at the *Seimas* following receipt of a copy of a court judgment and Article 260 regulates the vote on the decision to remove a person from office.

The petitioner questioned whether Article 259 of the Statute of the *Seimas*, which provides that the *Seimas* shall adopt the decision on the revocation of the mandate of a *Seimas* member after it has received a copy of an judgment of conviction by court, is in compliance with Article 74 of the Constitution, which provides that the mandate of a *Seimas* member is revoked in accordance with the procedure for impeachment proceedings. The petitioner stressed that Article 259 of the Statute of the *Seimas* provides that the decision on revocation of the mandate is adopted at a routine sitting of the *Seimas* in the absence of the *Seimas* member whose mandate is being revoked.

The Constitutional Court emphasised that impeachment is a means by which civic society can protect itself. In the constitutions of democratic states impeachment is treated as a special procedure when the question of the constitutional responsibility of an official is decided. By providing for a special procedure for dismissal of the highest officials from office or for revocation of their mandate, one ensures public and democratic control over their activities. At the same time, these officials are granted additional guarantees so that they can fulfil their duties on the basis of law. However, the *Seimas*, when using its discretion to establish a differentiated procedure for impeachment proceedings, is bound by the constitutional concept of impeachment. This concept presupposes fair judicial proceedings in which priority is given to the protection of the rights of individuals. This is only possible when the proceedings are public, the parties to the proceedings enjoy equal rights, and the proceedings in court - especially those regarding the rights of individuals - ensure that the said person has the right and an opportunity to defend his rights. In a state governed by the rule of law, the right of an individual to defend his rights is unquestionable. Prior to its decision, the *Seimas* must also hear the other party (*audi alteram partem*).

Article 29.1 of the Constitution provides that all persons shall be equal before the law, the courts, and other State institutions and officers. Article 259 of the Statute on the other hand does not provide for the impeached person to take part in the proceedings to defend him or herself. In this case, the absence of such rights in the Statute means that they are restricted. The impeached person has no right to be acquainted with the charge on the basis of which the question of his or her removal from office or revocation of his or her mandate is decided or with the procedure for deliberation of this question at the *Seimas*. Neither does he or she have any right to counsel or to other representatives, to present evidence regarding his constitutional responsibility, to take part in the pleadings or to have the last replication or the final word. Such proceedings wherein the aforementioned rights are not guaranteed are not in line with the constitutional concept of impeachment.

The Constitutional Court ruled that Article 259 of the Statute of the *Seimas* contradicts Article 74 of the Constitution to the extent that it restricts the right of the convicted person to take part in the impeachment proceedings and his right to defence.

Languages:

Lithuanian, English (translation by the Court).

LTU-1999-2-005 05-02-1999 5/98 on equity

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05-02-1999 / **e)** 5/98 / **f)** on equity / **g)** *Valstybes Zinios* (Official Gazette), 15-402, 10.02.1999 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** - Separation of powers.
3.23 **General Principles** - Equity.
4.7.2 **Institutions** - Judicial bodies - Procedure.
4.7.4.3.1 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel - Powers.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Independence.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

Independence / Judge, participation in previous proceedings / Judge, withdrawal from the case / Investigation, preliminary.

Headnotes:

The right to a fair trial is one of the fundamental principles of a state governed by the **rule of law**. Its content is very wide. Article 109.1 of the Constitution, which states that justice is administered by the courts only, means in criminal procedure law that a person may not be held guilty of committing a crime or given a criminal punishment except by a court judgment in accordance with the law. The independence of the court in deciding all questions linked with cases under investigation is an important aspect of the independence of the judge and the court in criminal proceedings. Only the court decides how it has to investigate a criminal case. The court is independent in all phases of the criminal case which is under its investigation.

The Code of Criminal Procedure establishes the impartiality of the judges. The judge may not investigate the case at any phase of the procedure in cases where he was formerly the victim, the civil claimant or respondent in that case, or if he participated in the case as a witness, prosecutor, an expert etc. Under such circumstances the judge must withdraw from the case.

Summary:

The petitioner questioned whether Articles 255.4, 255.5, 256.4, 260.4, 280.1, 280.2 and 280.6 of the Code of Criminal Procedure (the CCP) were in compliance with the Constitution. The petitioner argued from the content of Articles 255.4 and 260.4 that the said norms create such a procedural relation between the judge and either the investigator or the body which carries out questioning, that the judge has to assess the quality of their work. If the work of the investigator has been performed in an unsatisfactory manner, the court has the right to rectify this. By not referring the case back to complete the investigation but suspending the case the court obliges the investigator or the body carrying out questioning to present new evidence and sets the term during which this work must be accomplished. Such a practice is not in line with Article 109.1 of the Constitution. The petitioner was of the opinion that in cases where there is an incomplete preliminary investigation, the disputed norms relieve public prosecutors from controlling the activities of investigative bodies and bodies carrying out questioning. This function is transferred to the court even though the court must never exercise control over the activities of bodies which conduct questioning and investigators.

In the opinion of the petitioner, grounds exist to assert that the disputed norms, which unreasonably diminish the scope of the constitutional duties and responsibilities of public prosecutors in cases when the preliminary investigation is incomplete, restrict the powers of the judiciary.

The petitioner doubted whether the disputed norms of the CCP are in compliance with the provision of impartiality of the court which is contained in Article 31.2 of the Constitution. After the judge has given instructions to the investigator or the body responsible for questioning, he maintains organisational links with the investigator or the body responsible for questioning when they become acquainted with the material of the case. The case remains under the supervision of the court and such ties inevitably acquire the nature of interest. The petitioner was of the opinion that the norms of Articles 255.4, 256.4 and 260.4 of the CCP which provide for the manner of evidence collection when the case remains with the judge and upon its suspension violate the right of indicted persons to a fair trial which is provided for by Article 31.2 of the Constitution.

In the opinion of the petitioner, the norms of Article 280.1, 280.2 and 280.6 of the CCP concerning the changing of charges during the trial are doubtful as they violate the right of persons to defence, established by Article 31.6 of the Constitution. According to the petitioner, by reducing or increasing charges under Article 280 of the CCP, the court undertakes the functions of a prosecutor. This violates the limits of functions of courts and prosecutors which are established by Articles 109.1 and 118.1 of the Constitution, as well as the right of indicted persons to an impartial trial which is established by Article 31.2 of the Constitution.

The Constitutional Court stressed that the obligation of the court is to use all means possible in order to establish the truth in a criminal case. At the same time, when striving towards these ends, the court must not overstep the limits of the justice administration functions which are established by the Constitution. The disputed norms of Article 255.4 and 255.5 of the CCP link the instructions of the court to the investigator or

the body responsible for questioning with a recognition that the preliminary investigation is incomplete. The court obliges not the prosecutor who has presented the case to the court to provide new evidence but the investigator or the body carrying out questioning directly. After it becomes clear that the preliminary investigation is incomplete, the court, in a sense, has taken the functions of the prosecutor who is responsible for the preliminary investigation of the case. This gives rise to a belief that there are elements of criminal prosecution in the actions of the court which are uncharacteristic of the judicial function.

The Constitutional Court indicated that with regard to the independence of the court, the fact that the court follows norms of the CCP does not mean in itself that its independence is denied. On the other hand, the fact that the court, upon recognition that the preliminary investigation was incomplete, requires the investigator or body carrying out questioning to present new evidence, which is provided for by the disputed norms, makes it possible to assert that the courts carry out functions which are uncharacteristic. When a court or a judge gives instructions to the investigator or body carrying out questioning, procedural links are established between these institutions which may condition the interest of the court. Preconditions are thereby created which bring into doubt whether the court, applying these norms, is an impartial arbiter. It needs to be noted that in such cases it could be more difficult for the judge himself to assess the circumstances of the case in an objective manner.

The accused's right to defence ensured by Article 31.6 of the Constitution presupposes that the accused must be guaranteed sufficient procedural means to defend himself or herself against the charge and that he or she must have an opportunity to make use of them. The accused's right to defence is one of the guarantees for the establishment of truth in the case. This right is considered a necessary condition to fulfil the objective of criminal procedure, which is justly to punish every person who committed a crime and to ensure that innocent persons are not held criminally responsible and convicted.

Article 280.1 of the CCP provides: "A charge may be reduced in court provided the new charge does not differ in essence in its factual circumstances from the initial charge. It shall also be permitted to reduce the initial accusation or remove circumstances aggravating the responsibility of the accused."

When assessing the norm which permits the court to qualify the accused's action under an Article of the CCP providing for a more moderate punishment, or to reduce the initial charge or remove aggravating circumstances, there is no reason to assert that the situation of the accused is being aggravated. On the other hand, where the charge is increased, the situation of the accused becomes more difficult. This procedure is not in line with the principle of the court's impartiality. By changing the charge in such a way, the court more or less shows what direction the investigation of the case will take. Such a change in the charge may impede the judge to impartially assess circumstances of the case. Besides, this creates preconditions for the participants in the proceedings to reasonably doubt the impartiality of the court.

The Constitutional Court ruled that the norms of the CCP which are connected with the principle of the independence of judges and in part with the principle of the accused's right to defence (Article 280.1 of the CCP) do not contradict the Constitution. All the other norms of the CCP which have been challenged contradict the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-1997-3-009 01-10-1997 7/97 On sequestration of property

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 01-10-1997 / **e)** 7/97 / **f)** On sequestration of property / **g)** *Valstybes Zinios* (Official Gazette), 91-2289, 07.10.1997 / **h)** CODICES (English, Lithuanian).

Keywords of the Systematic Thesaurus:

4.7.4.3 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel.
4.7.4.3.1 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel - Powers.

4.7.4.3.6 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel - Status.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Ubi jus ibi remedium / Property, sequestration, appeal.

Headnotes:

Of the various possible means of coordinating or protecting different persons' conflicting rights and interests, one of the most important is their protection in court. Such a means is consolidated in Article 30.1 of the Constitution, which provides: «Any person whose constitutional rights or freedoms are violated shall have the right to appeal to a court».

In a State governed by the **rule of law** everyone has the possibility of protecting their rights in an independent and impartial court against interference by other persons, as well as against unlawful actions of state institutions or officials. This is particularly important when the conflict concerns fundamental rights and freedoms such as property rights.

Property sequestration is a preventive measure and does not deprive property owners of their ownership rights but merely restricts certain of these rights. As a rule, it imposes restrictions on disposal of the property, but restrictions on its use and management may also be applied in cases where there is a risk of the property's value diminishing or even of destruction of the property. However, such restrictions may not go so far as to deny the right of a private owner to defend his property rights before a competent and independent judicial body.

Human rights and freedoms not specifically protected by law would become meaningless if one did not take account of the universal rule *ubi jus ibi remedium*: if the law grants a right, it also provides for means of protection of this right. One of the main guarantees of protection of any person's rights is their right to appeal to a court. Appeal to a court is a fundamental right guaranteed by the Constitution and must not be limited.

Summary:

By an interlocutory ruling, the Vilnius County Court suspended its investigation of a case and petitioned the Constitutional Court requesting a ruling as to whether the procedure for appealing against a decision of the investigator to sequestrate property as established in Articles 195.5 and 242 of the Code of Criminal Proceedings was in compliance with the Constitution. In its petition the Court pointed out that, under Article 30.1 of the Constitution, any person whose constitutional rights or freedoms are violated shall have the right to appeal to a court.

Under Article 195.5 of the Code of Criminal Proceedings, sequestration imposed on property shall be repealed by a decision of the investigator if such a measure becomes unnecessary, while under Article 242 of the said code, actions of the investigator may be appealed against to the prosecutor. Solving of property sequestration issues during investigation of a criminal case in court is not provided for. Even though under the Constitution prosecutors are a constituent part of the judicial power, one nevertheless cannot equate them entirely with the court, since the prosecutor may not accomplish the functions of administration of justice which are attributed to the court.

Judicial procedures afford guarantees of universally recognised democratic principles (such as equality before the court, the right to a public hearing in court etc.) which are not provided elsewhere. Although it is impossible to list in the Constitution all cases when a court decision (order) is necessary, Article 30.1 of the Constitution consolidates people's right to appeal to a court when human rights and freedoms are concerned.

It is thus important that when checking the lawfulness of the actions performed by the investigator, the prosecutor should not become the final arbiter as concerns human rights and freedoms.

Where the prosecutor rejects an application to annul a decision of the investigator to sequestrate property, the person concerned should not be prevented from appealing to a court. As property rights are considered to be fundamental constitutional rights, only a court should be the final arbiter of the lawfulness of the decision to sequestrate property.

The Constitutional Court ruled that Article 242 of the Code of Criminal Proceedings, which restricts a person's right to appeal to a court against a decision to sequestrate property, contradicts Articles 23.1, 23.2 and 30.1 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-1996-1-004 18-04-1996 12/95 On Commercial Banks

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18-04-1996 / **e)** 12/95 / **f)** On Commercial Banks / **g)** *Valstybes Zinios* (Official Gazette), 36-915, 24.04.1996 / **h)** CODICES (English, Lithuanian).

Keywords of the Systematic Thesaurus:

4.7.2 **Institutions** - Judicial bodies - Procedure.
4.10.5 **Institutions** - Public finances - Central bank.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.
5.4.6 **Fundamental Rights** - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Bank, commercial, insolvency / Depositor, protection / Bankruptcy, commercial bank.

Headnotes:

Subjective property rights are an element of the absolute legal relation of ownership whereby the owner may oppose all other persons in respect of the use of the property. On the other hand, the owner, when exercising his property rights, is not entirely free. It is established in Article 28 of the Constitution that: «While exercising their rights and freedoms, persons must observe the Constitution and the laws of the Republic of Lithuania, and must not impair the rights and interests of other people». Therefore, the subjective property right may be defined as the legally protected opportunity of the owner to manage the possessions which belong to him, to utilise and dispose of them at his discretion and in his interests, within the bounds, however, of the limits imposed by the law and by respect for the rights and freedoms of other people.

In common with the protection of fundamental rights in other democratic States governed by the **rule of law**, restrictions may lawfully be placed on the exercise of property rights, as well as on some other basic human rights. But in all cases, the essential content of the basic right cannot be violated by such restrictions. If reasonable limits are exceeded, or if its legal protection is not sufficiently ensured, that is a situation which is to be distinguished from the denial of the fundamentals of the right.

Legal persons also have a constitutional obligation to observe the Constitution and the laws, as well as not to impair the rights and interests of other people. It follows from the content of Article 28 of the Constitution that persons who when exercising their rights and freedoms do not observe the Constitution and the laws, or impair the rights and freedoms of others, may be subject to corresponding sanctions, including restrictions on their property rights and restraints on their economic activities and power of initiative.

The possibility of applying sanctions to a bank is connected to the establishment of violations of law committed by the management bodies of the bank, and to the non-fulfilment of obligations concerning its economic activities.

The main objective of the sanction - suspension of the activities of the management bodies of the bank - which is regulated by the contested provisions of the law is a preventive one: if there appears to be a threat to the trustworthiness and stability of the bank, the law attempts to protect the interests of depositors and to ensure the safety, trustworthiness and stability of the bank and banking system.

The bank, disposing of the assets of others, assumes corresponding risks and responsibilities, and its share capital constitutes a guarantee for the borrowed capital. From this perspective, the above sanction also seeks to preserve the bank's assets and to improve its functioning.

The institution of bankruptcy proceedings is an example of the exercise of a person's right to appeal to a court, as consolidated in Article 30.1 of the Constitution. The legal provisions which consolidate this right do not violate the principle of equality of all people before the court. After bankruptcy proceedings have been instituted, other persons who have legitimate property interests take part in the investigation of such civil proceedings, i.e, they take part in the bankruptcy procedure which is investigated in accordance with the determined legal procedure. Every person taking part in the proceedings has the rights and obligations which are determined by the Code of Civil Procedure and which correspond to his or her procedural status, as well as, in this case, the rights characteristic of the judicial bankruptcy procedure against a bank as provided for by the Law on Commercial Banks. Therefore, the objection of the petitioner that the institution of bankruptcy proceedings is «a procedural decision in favour of the subject that brought the action» is not well-founded.

Under Article 5 of the Code of Civil Procedure, the court must institute civil proceedings in all cases where the statement of the party concerned complies with the requirements of the relevant provisions on civil procedure. The disputed norms of the Law in question were to be interpreted analogously in an imperative manner: the court must institute bankruptcy proceedings if the statement of the party concerned is in conformity with general requirements of the relevant provisions of the Code of Civil Procedure as well as with supplementary conditions provided for in that Law. Thus, the institution of bankruptcy proceedings against a bank is linked to the fulfilment of the corresponding requirements of a procedural character. It should not be viewed as a violation of the principle of the independence of judges and of the courts.

Summary:

The case was referred by the Court of Appeal, requesting a review as to whether certain provisions of the Law on Commercial Banks were in compliance with the Constitution.

The petitioner argued that Article 37 of the Law, which provided that the Bank of Lithuania was entitled to suspend the powers of the bank council, to remove from office the board of the bank and the head of the bank administration, and to appoint a temporary bank administrator, had the effect that a State institution, the Bank of Lithuania, had the power to decide to take over private property - the property of a commercial bank - and to manage it. Once so taken over, the shareholders/owners of the bank were deprived of the possibility of managing and utilising their property. Thus the right to private property, as well as the freedoms of commercial activity and of initiative, were restricted in a manner which was contrary to the principle of equality before the courts, as consolidated in Article 29.1 of the Constitution.

Furthermore, in the opinion of the petitioner, there existed grounds for finding that the above legal provisions contradicted Article 109.2 of the Constitution, which consolidates the independence of judges and courts while administering justice. The requirement for the court to act in a particular manner impeded the court, and made it dependent upon the will of the party submitting the statement concerning the institution of bankruptcy proceedings. In addition, reliance by the court in such circumstances on the sole and uncontested evidence of the Bank of Lithuania concerning the solvency of the bank in question deprives the court of the possibility of arriving at an alternative procedural decision - to refuse to institute bankruptcy proceedings against the bank.

The Constitutional Court pointed out that, under Article 45 of the Law, the conclusion of the Bank of Lithuania concerning the commercial bank's insolvency could be challenged by any party before the court considering the request for the institution of bankruptcy proceedings against the bank, and that their rights were thus protected. The Bank of Lithuania, which is obliged by law to ensure the reliable functioning of the currency market and the system of credits and payments, is also entitled to submit a statement to the court regarding the bank's insolvency.

It was also noted that in the bankruptcy law of other countries, the right of the State institution which supervises banking to immediately apply sanctions to an insolvent bank so that its depositors were protected and the remaining assets were preserved was essentially not disputed: after the failure of a private bank, State interests, and not only those of a limited private sphere, are also affected.

The individual's right to appeal to the court is implemented by the procedure established by the Code of Civil Procedure and other laws. If a person enjoys a subjective procedural right to appeal to the court and has exercised it accordingly, the relevant provisions of the Code of Civil Procedure do not provide for an opportunity to reject his application. The acceptance of the application by court order, as a procedural act, confirms the institution of civil proceedings before the court.

The Constitutional Court ruled that the disputed provisions of the Law on Commercial Banks were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

LTU-1994-3-021 22-12-1994 27/94 The reform of the courts' system

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22-12-1994 / **e)** 27/94 / **f)** The reform of the courts' system / **g)** *Valstybes Zinios* (Official Gazette), 101-2045, 30.12.1994; *Nutarimai ir Sprendimai* (Official Digest), 76 / **h)** *East European Case Reporter of Constitutional Law*, 1995, vol. 2, n° 2, 213; CODICES (Lithuanian).

Keywords of the Systematic Thesaurus:

1.3.4.2 **Constitutional Justice** - Jurisdiction - Types of litigation - Distribution of powers between State authorities.
3.9 **General Principles** - Rule of law.
4.5.8 **Institutions** - Legislative bodies - Relations with judicial bodies.
4.7.4.1 **Institutions** - Judicial bodies - Organisation - Members.
4.7.4.1.5 **Institutions** - Judicial bodies - Organisation - Members - End of office.
4.7.4.1.6.3 **Institutions** - Judicial bodies - Organisation - Members - Status - Irremovability.
5.3.13.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope.

Headnotes:

Since neither the Constitution nor the laws have determined the ways and methods to be used to implement the reform of the judiciary, the *Seimas* acted within its prerogatives when enacting laws provided by the Constitution.

The independence of judges as well as of courts is one of the most significant principles of democracy and of a State governed by the **rule of law**. The independence of judges includes guarantees for the judges' tenure. The termination of the powers of judges in Lithuania is possible only on the grounds established by the Constitution.

Summary:

A group of *Seimas* members asked the Constitutional Court to examine whether some provisions of the Law on the reform of the judiciary were consistent with the Constitution. The petitioners contested in particular the following provision: «The present Supreme Court of Lithuania shall be abolished, and its functions as well as the powers of the judges of the Court terminated on 31 December 1994. The Supreme Court of Lithuania shall be established on 1 January 1995 for the implementation of other functions prescribed by law».

The Constitutional Court recognised that the *Seimas* had the right to determine the way in which the reform of the judiciary should be implemented. However, the provision of the Law in dispute regarding the termination of the powers of judges was held to be in contradiction with the Constitution.

Supplementary information:

On 30 December 1994 the Constitutional Court made a decision concerning the interpretation of the above-mentioned ruling. It held that the part of the ruling regarding the impossibility to dismiss court judges from offices except in cases established by the Constitution, should be applied only to court judges and not to heads of courts.

Languages:

Lithuanian.

MDA-2003-2-005 03-06-2003 11 Constitutional review of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Laws no. 146-XIV of 30 September 1998, no. 367-XIV of 29 April 1999, no. 795-XIV of 10 February 2000 and no. 1534-XV of 13 December 2002 amending and supplementing Law no. 718-XII of 17 September 1991 on parties and other social and political organisations

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 03-06-2003 / **e)** 11 / **f)** Constitutional review of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Laws no. 146-XIV of 30 September 1998, no. 367-XIV of 29 April 1999, no. 795-XIV of 10 February 2000 and no. 1534-XV of 13 December 2002 amending and supplementing Law no. 718-XII of 17 September 1991 on parties and other social and political organisations / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian).

Keywords of the Systematic Thesaurus:

3.3.1 **General Principles** - Democracy - Representative democracy.
4.9.7.3 **Institutions** - Elections and instruments of direct democracy - Preliminary procedures - Registration of parties and candidates.
5.3.28 **Fundamental Rights** - Civil and political rights - Freedom of assembly.

Keywords of the alphabetical index:

Political party, member, list, renewal / Party, persons responsible, obligation to report / Political party, definition.

Headnotes:

A political party is an association which has the aim of applying an ideology relating to the government of society. The political party has a managing body, composed of responsible persons, with responsibility to the members of the party and to society for the activities for the managing organs of the party, for discipline and for providing evidence both within the framework of the party and in relation to the other institutions of society.

The measures concerning evidence and the responsibility placed on the leaders in the context of the parties, the submission of reports to the public institutions and the collection of signatures of their members do not restrict the right of free association in parties, as guaranteed by Article 41.1 of the Constitution.

Article 41.4 of the Constitution provides that parties and other social or political organisations may be dissolved if they are declared unconstitutional where, by their activities, they are engaged in fighting against political pluralism, the principles of a State governed by the **rule of law**, the sovereignty and independence, and also the territorial integrity, of the Republic.

Summary:

A Member of Parliament brought an application to the Constitutional Court for consideration of this case, which involved reviewing the constitutionality of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Law no. 146-XIV of 30 September 1998 amending Article 5.3.a, by Law no. 367-XIV of 29 April 1999 replacing the word "150" in that article by the word "600", by Law no. 1534-XV of 13 December 2002 amending and supplementing Articles 15.2, 18.3, 20.1, 21.1 and 32.1 of that law.

The amendments to the Law on political parties and other social and political organisations introduced by those laws establish the number of members necessary to register the articles of association of a party and the conditions on which a party ceases its activities. According to the new provisions, the Supreme Court of Justice declares that a party has ceased its activities and may dissolve it where the party has not convened a congress for four years, or has not, within the period prescribed by law, submitted the lists of its members, renewed annually. On the date on which the lists of the members of the party are checked, it may be declared that the number of members has fallen below the limit fixed for registration of the articles of association.

The applicant challenged the rules according to which parties must submit annually to the Ministry of Justice, between 1 January and 1 March, the lists of their members in order to confirm that they have the minimum number of members, and the capacity of member must be recorded annually in the lists of members of the party or of other social and political organisations.

The applicant maintained that the abovementioned provisions limited the citizen's right of free association and limited the practical application of political pluralism as a constitutional principle. Those provisions required the completion of certain organisational and evidential acts which, in his view, amounted to a new annual registration of political parties and diverted their attention from the implementation of their action programmes and required the questioning of members of the party and annual confirmation of their political choice at the initiative of the organ of the party of which they were members, thus failing to have regard for the constitutional provision on the individual's right of free association.

The Court considered that the proceedings concerning the constitutional review of Article 5.3.a of Law no. 718-XII, as amended by Law no. 146-XIV determining the number of members necessary for registration of the status of the party, had to be stayed, as it had previously ruled on the constitutionality of that article, by Judgment no. 3 of 29 January 1999.

The Court held that the measures concerning evidence and the responsibilities placed on the management organ of the party, the submission of reports to the public institutions, and also the collection of members' signatures, did not restrict the right to associate freely in parties, as guaranteed by Article 41.1 of the Constitution.

The Court stated that, according to their legal nature, the provisions on the cessation of the activities of the

party were in the nature of a sanction as they specify the conditions on which the party or other social and political organisations may be dissolved.

Under Article 41.4 of the Constitution, parties and other social and political organisations may be dissolved only if they are declared unconstitutional and if, by their aims or activities, they are engaged in fighting against political pluralism, the principles of a State governed by the rule of law, the sovereignty and independence or the territorial integrity of the Republic.

The European Court of Human Rights has held in its judgments, emphasising the importance of democracy in the system of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that political parties are covered by Article 11 and that, accordingly, their dissolution by the authorities of the State must satisfy the requirements of Article 11.2 of the Convention.

At its 41st session (10-11 December 1999), the Venice Commission adopted seven guidelines on the prohibition and dissolution of political parties and similar measures. In those principles, the Venice Commission reiterated the findings of the European Court establishing that the prohibition or dissolution of a political party had to be decided by the Constitutional Court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.

In exercising its power to apply its constitutional jurisdiction, the Court held that the following provisions were constitutional: the word "600" in Article 5.3.a of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Law no. 367-XIV, the provisions of Articles 15.2.e, 18.3.4 and 20.1 of Law no. 718-XII of 17 September 1991, as amended by Law no. 1534-XV, the words "The capacity of member shall be recorded in the lists of members of the party or of another social and political organisation according to the rules laid down in the regulation on the registration of parties and other social and political organisations" in Article 21.1 of Law no. 718-XII, as amended by Law no. 1534-XV.

The Court declared the provisions of Article 32.1 of Law no. 718-XII, as amended by Law no. 1534-XV, unconstitutional.

Dissenting opinion

Two judges delivered a dissenting opinion. By Judgment no. 11 of 3 June 2003, the Court held that the words "The capacity of member shall be recorded in the lists of members of the party or of another social and political organisation according to the rules laid down in the regulation on the registration of parties and other social and political organisations" were constitutional.

In the view of the dissenting judges, the periodical reconfirmation by signature of adherence to the party restricted the individual's right of free association in the form of a party, the right to political identity and, indirectly, the right to freedom of movement, since the person concerned was required to remain in the administrative and territorial unit during the period in which signatures were collected. The judges considered that the Court's decision was unfounded and that the contested provisions were unconstitutional.

Languages:

Romanian, Russian.

NED-1994-3-029 23-11-1994 29.392

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 23-11-1994 / **e)** 29.392 / **f)** / **g)** / **h)** *Vakstudie Nieuws*, 15.12.1994, 3829, nr. 3; *Beslissingen in Belastingzaken*, 1995, 25; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.

5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.23.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to remain silent - Right not to incriminate oneself.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Audit.

Headnotes:

Cooperating with an audit does not have the effect of making the imposition of a fine incompatible with any **rule of law**, and in particular with the right to a «fair trial». Since there was no question, during the audit, of criminal charges, the evidence obtained as a result of that investigation was not obtained in a manner incompatible with Article 6 ECHR.

Summary:

X BV voluntarily cooperated with an audit by allowing its accounts and other documents to be scrutinised and by answering questions. During this investigation it was found that X BV had neither deducted the discounts it had allowed its clients from the invoices nor credited them separately. The Inspector of Taxes imposed a fine in the adjusted tax assessment.

The point at issue was whether the Court of Appeal violated the «fair trial» principle of Article 6 ECHR, from which may be inferred the right of any person charged with a criminal offence to remain silent and not to incriminate himself, and/or Article 14.3.g of the International Covenant on Civil and Political Rights, by using evidence obtained during the audit in arriving at its decision to impose the fine.

The Supreme Court held that the obligation to cooperate with an audit on the basis of domestic legislation, at least where there is no question of a situation in which the taxpayer may be regarded as having been charged with a criminal offence, does not have the effect of making the imposition of a fine incompatible with any rule of law. In particular, it did not contravene the right to a fair hearing of its case, as invoked by X BV.

The Supreme Court also held that inasmuch as the substance of X BV's complaint was that the evidence on which the fine was based was obtained in contravention of Article 6 ECHR. it was ill-founded, as the facts did not in themselves lead to the conclusion that there was any question of criminal charges, whether prior to or during the audit, within the meaning of the Articles referred to.

Languages:

Dutch.

POL-2004-2-016 11-05-2004 K 4/03

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11-05-2004 / **e)** K 4/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 122, item 1288; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004/A, no. 5, item 41 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.11 **General Principles** - Vested and/or acquired rights.

3.12 **General Principles** - Clarity and precision of legal provisions.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, avoidance / Tax, evasion.

Headnotes:

One of the elements of the principle of trust in the State and its laws, as derived from the principle of the **rule of law** (Article 2 of the Constitution), is the prohibition of sanctioning - in the sense of attributing negative consequences to, or refusing to recognise positive consequences of - the lawful behaviour of legal norms' addressees. Thus, where the addressee of a legal norm concludes a lawful transaction and thereby achieves a goal which is not prohibited by law, the objective (including the tax objective) accomplished in this manner should not be regarded as tantamount to prohibited objectives.

The constitutional obligation to pay taxes specified by statute (Article 84 of the Constitution) does not constitute an obligation for taxpayers to pay the maximum amount of tax, nor a prohibition on taxpayers seeking to take advantage of various lawful methods of tax optimisation. There is a fundamental difference between unlawful tax evasion, constituting an infringement of law, and the avoidance of tax as a result of lawful transactions concluded for this purpose.

Summary:

The President of the Supreme Administrative Court and the Ombudsman jointly requested the constitutional review of two provisions of the Tax Ordinance Act 1997 (hereafter "the Act").

According to Article 14.1.2 of the Act, the Minister of Finance is authorised to issue interpretations of tax law "taking into account the jurisprudence of the courts and the Constitutional Tribunal". Whilst the Minister's interpretations of law are binding on subordinate authorities, they do not bind taxpayers and, in particular, may not constitute a source of taxpayers' obligations. Article 14.3 acts as a significant guarantee in this respect, stating that taxpayers shall not suffer adverse consequences as a result of their compliance with interpretations of law promulgated in the Official Journal although, as a rule, this would not release them from the obligation to pay the tax; exceptionally it may justify the remission of tax arrears.

According to Article 24b.1 of the Act where a tax or fiscal control authority demonstrates that, when concluding a particular transaction, "one should not have expected other significant benefits" (i.e. benefits other than the aforementioned tax benefits), the authority should "disregard the tax effects" of such a transaction. According to Article 24b.2, which states that where the parties have, in concluding a transaction, achieved an "intended economic result" for which a transaction other than that indicated by the parties is appropriate, the tax effects are to be deduced on the basis of that alternative ("appropriate") transaction.

The Tribunal ruled that:

- Article 14.2 of the Tax Ordinance Act, insofar as it states that interpretations of the Minister responsible for public finance affairs shall be binding on tax and fiscal control authorities, does not conform to Article 78 (the right to appeal) and the second sentence of Article 93.2 of the Constitution (decisions in respect of individuals cannot be based on the orders of the Prime Minister or of Ministers).

- Article 24b.1 of the Tax Ordinance Act does not conform to Article 2 of the Constitution (rule of law principle), read in conjunction with Article 217 of the Constitution (exclusivity of statutory regulation of tax issues).

- The Tribunal discontinued proceedings in relation to the review of Articles 18.2 and 59 of the Chief Administrative Court Act 1995 - by reason of loss of binding force of these provisions, pursuant to Article 39.1.3 of the Constitutional Tribunal Act.

Four judges presented a joint dissenting opinion.

From the principle of the rule of law, as expressed in Article 2 of the Constitution, stems the requirement for the legislator to comply with the principles of correct legislation. This requirement is functionally tied to the principles of legal certainty, legal security and protection of trust in the State and its laws. These principles have particular significance in the sphere of human and civil rights and freedoms.

The constitutional requirements of correct legislation are infringed, in particular, when the wording of a legal provision is so vague and imprecise that it creates uncertainty amongst its addressees as regards their rights and duties, by creating an exceedingly broad framework within which authorities charged with applying the provision are required, *de facto*, to assume the role of law-maker in respect of these vaguely and imprecisely regulated issues. Where legal provisions exceed a certain degree of ambiguity this may in itself constitute grounds for declaring such provisions to be unconstitutional, both in respect of constitutional provisions requiring statutory regulation in a certain field (so-called legal reservation), such as the placing of limitations on the exercise of constitutional rights and freedoms (the first sentence of Article 31.3), and also in respect of the rule of law principle as expressed in Article 2.

The principle of the specificity of legal provisions, as a constituent component of the principle of trust in the State and its laws, requires particular emphasis in certain fields of legal regulation. In addition to criminal law, one such field is the law relating to public levies. The principle of the specificity of legal provisions is made concrete in this field by the requirement that the constitutive elements of taxes and other public levies be defined by statute (Article 217 of the Constitution). The legislator's correct stipulation of all taxpayers' duties, together with the consequences of their actions from the perspective of instituted public-legal obligations, also represents an expression of compliance with the principle of legality (Article 7 of the Constitution), according to which all organs of public authority may only act within the limits of, and on the basis of, the law.

Use of the following ambiguous phrases in Article 24b.1 of the Act raises objections which do not permit one to assume that the interpretation of such phrases within jurisprudential practice will actually be uniform and rigorous, or that their wording will prevent organs applying the law from deducing that they may engage in law-making: "one could not have expected"; "other significant benefits"; "benefits stemming from the reduction of tax liability". The legislator's assumption that the taxpayer's transaction should bring not only tax benefits (i.e. reducing tax liability, increasing tax reimbursement, increasing the taxpayer's loss) but also other unspecified significant benefits unrelated to tax liability, is vague in itself.

An individual's constitutional right to have their case reconsidered following the lodging of an appeal is rendered illusory by the existence of binding abstract interpretations of tax law issued by the Minister. The binding nature of the official interpretation on all tax and fiscal control authorities, in practice, reduces the two-instance review merely to a formal process for confirming that the first instance organ correctly complied with the instructions contained in the official interpretation. The fact that the binding official interpretation is abstract in nature (i.e. it does not apply only to the case of a particular taxpayer) does not alter the nature of its influence on the substance of decisions taken by fiscal organs in the cases of individual taxpayers.

In addition to its non-conformity with the second sentence of Article 93.2 of the Constitution, the approach adopted in Article 14.2.2 of the Act may lead to the unbalancing of the whole concept of the sources of law, as adopted by the constitutional legislator.

Taxpayers who abuse their economic freedom, as opposed to taxpayers who violate the law, do not directly avoid the payment of tax but merely seek to endow their economic behaviour with such features as to render it non-taxable, although the ultimate economic result is the same as in the event of taxable behaviour. The essence of such behaviour is the conclusion by taxpayers of transactions which, although permitted by law, have been entered into for purposes which are not permitted by law. A specific feature of this behaviour - referred to as "inadequacy" - is the application of means that do not lead in the simplest way to achieving the

intended economic goal.

The decision to deprive a particular provision of binding force as a result of its ambiguity should be treated as a last resort, utilised only in the event that other methods of removing the consequences of such ambiguity, in particular by way of judicial interpretation by the courts, prove insufficient. In the present case, the content of financial law doctrine and the jurisprudence of the courts are uniform to such an extent that no doubts are raised as regards the proper understanding of the challenged Article 24b.1 of the Act, despite its infelicitous drafting.

The removal of the challenged provision from the legal order may have a dangerous impact on the functioning of public finance by upsetting - contrary to Article 2 of the Constitution - the coherence of its statutory legal regulation. This may be taken advantage of in order to effectively "legalise" certain forms of tax misappropriations within transactions involving dishonest taxpayers.

Cross-references:

- Judgment K 39/97 of 10.10.1998, *Bulletin* 1998/3 [POL-1998-3-018];

- Judgment K 19/99 of 13.02.2001, *Bulletin* 2001/1 [POL-2001-1-008];

- Judgment K 6/02 of 22.05.2002, *Bulletin* 2002/3 [POL-2002-3-028];

- Judgment P 13/01 of 12.06.2002, *Bulletin* 2002/2 [POL-2002-2-019];

- Judgment K 41/02 of 20.11.2002, *Special Bulletin - Human Rights Limitations* [POL-2002-H-002];

- Judgment P 13/02 of 01.12.2002, *Bulletin* 2002/1 [POL-2003-1-008] - quoted in the dissenting opinion to the present judgment;

- Procedural decision SK 16/02 of 14.07.2004, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004/A, no. 7 item 77.

Languages:

Polish, English (summary).

POL-2004-2-015 05-05-2004 P 2/03

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05-05-2004 / **e)** P 2/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 111, item 1181; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004/A, no. 5, item 39 / **h)** CODICES (English, French, Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.14 **General Principles** - *Nullum crimen, nulla poena sine lege*.
5.1.3.2 **Fundamental Rights** - General questions - Limits and restrictions - General/special clause of limitation.
5.2.1 **Fundamental Rights** - Equality - Scope of application.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.24 **Fundamental Rights** - Civil and political rights - Right to information.

Keywords of the alphabetical index:

Media, press, written, right to response / Media, statement, response, rectification, definition / Media, editorial comments, publication.

Headnotes:

The requirement that any limitation imposed on constitutional rights and freedoms may only be imposed "by statute" (so-called legal reservation; Article 31.3 of the Constitution) signifies more than merely a reminder of the general principle of legal reservation in relation to regulating the legal situation of persons, which constitutes a classical element of the **rule of law** principle. It also introduces the requirement that such statutory provisions must be sufficiently precise. Behind the formulation stating that limitations to constitutional rights and freedoms may "only" be instituted by statute lies an order of completeness, allowing the complete extent of such restrictions to be identified on the basis of the interpretation of those statutory provisions.

Article 46.1, read in conjunction with Article 32.6 of the Press Act 1984, insofar as it prohibits, under threat of punishment, commenting on the text of rectifications published in the same periodical edition or broadcast, whilst failing to define the notions of rectification and response, does not conform to Article 2 of the Constitution (**rule of law** principle) and 42.1 of the Constitution (*nullum crimen sine lege*), since it is insufficiently precise in specifying the elements of the prohibited act.

Article 54.1 of the Constitution regulates three personal freedoms: to express one's opinions, to acquire information and to disseminate information. The notion of "opinions" should, in this case, be understood as broadly as possible, encompassing personal assessments of facts and phenomena in all aspects of life, viewpoints, suppositions and speculations, as well as informing about existing and presumed facts.

Summary:

The current Press Act 1984 imposes certain obligations, enforced by both civil and criminal sanctions, on editors-in-chief as regards their dealings with third parties. Such obligations include, in particular, the duty to publish free of charge "rectifications" and "responses" submitted by concerned persons, within a specified time frame and in a stipulated manner. In accordance with the 1984 Act, a "rectification" should be pertinent and relate to facts, with the subject-matter of the rectification relating to "an untrue or inaccurate message" contained in that work. Alternatively, a "response" is required to be pertinent and to possess a subject-matter relating to a "statement constituting a threat to personal interests". Article 32.6 of the Press Act 1984 prohibits the publication, or announcing, of editorial comments on a rectification in the same edition of the periodical or broadcast in which that rectification was published. The Act merely permits a periodical or broadcast to announce the inclusion of future explanations or polemics in subsequent editions or broadcasts. No equivalent prohibitions apply in respect of responses. Furthermore, the aforementioned legal classification is important from the perspective of criminal law. Article 46.1 of the 1984 Act prohibits, under threat of fine or restriction of liberty, failure to publish rectifications or responses, or publication thereof in a manner which does not conform to the Act - i.e. in particular by publishing a submitted rectification alongside a commentary thereon by the editorial board or the original author of the work to which the rectification relates.

The editor-in-chief of a local newspaper was accused of committing the offences specified in Article 46.1 of the Press Act 1984 by, *inter alia*, publishing rectifications accompanied by editorial comments. The District Court decided to refer a question of law to the Constitutional Tribunal.

The framework of permissible limitations on the freedom of expression, encompassing the freedom to hold one's opinions and to receive and impart information and ideas without interference from public authorities and regardless of State frontiers, is laid down in Article 10 ECHR in a similar formulation to Article 31.3 of the Constitution. In the light of Article 19.3 of the International Covenant on Civil and Political Rights, however, further limitations may be placed on the exercise of the right to freedom of expression, since this Covenant provision does not contain a reservation, similar to that contained in Article 31.3 of the Constitution, stating that such limitations must be "necessary in a democratic State".

In the light of Article 32.6 of the 1984 Act, the prohibition of publishing comments on submitted rectifications is not absolute, since it is permissible to include such comments in the next periodical edition or broadcast. The prohibition of commenting on rectifications alongside their publication is necessary in order to protect the freedom of expression of the person having submitted the rectification. It is permissible for the author of the original work, to which the rectification relates, to comment on the rectification; the only limitation on this right being the postponement of the moment at which the original author may take advantage of this possibility. The challenged provisions enable the maintenance of a balance of power between the media and persons submitting rectifications, with the latter generally having more limited possibilities of publicly expressing their views on a given issue, and do not infringe the norms indicated as the legal bases of review.

As regards the aforementioned provision, it is also not possible to speak of an infringement of society's right to reliable information. The challenged provisions permit, alongside the rectification, the publication of information announcing polemics or explanations in the subsequent periodical edition or broadcast. Any recipient interested in further debate concerning a certain topic is thus provided with information as to whether such debate will take place. Such information, furthermore, safeguards the recipient against the risk of assuming that the information presented in the rectification is objectively true.

The principle of specificity contained in Article 42.1 of the Constitution defines the acceptable limits for creating blanket norms of criminal law. Although a criminal law norm may be referential in nature, it is impermissible to fail to precisely specify each of the elements of such a norm that would prevent discretion in its application.

Since it is not possible to provide an unambiguous interpretation of the relevant criminal law norm, the challenged provision does not conform to the principles of appropriate legislation and specificity stemming from Articles 2 and 42.1 of the Constitution.

Cross-references:

- Judgment P 11/98 of 12.01.2000, *Special Bulletin Human Rights Limitations* [POL-2000-H-001];

- Judgment P 31/02 of 01.07.2003, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003/A, no. 6, item 58.

Languages:

Polish, English (summary), French (summary).

POL-2004-2-014 04-05-2004 K 8/03

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04-05-2004 / **e)** K 8/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 109, item 1163; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004/A, no. 5, item 37 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.19 **General Principles** - Margin of appreciation.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Family, protection, constitutional / Family, financial situation / Tax, couple, married / Spouse, death / Fairness, principle.

Headnotes:

Tax burdens may not infringe the essence of the values protected by the Constitution.

From the **rule of law** principle (Article 2 of the Constitution) follows the prohibition on adopting laws that would surprise citizens by virtue of their content or form. Citizens should have the sense of relative legal stability in order to be able to arrange their affairs confident in the fact that, whilst taking certain decisions and undertaking certain actions, they do not expose themselves to adverse and unforeseeable legal consequences.

The recognition of family as a constitutional value protected and cared for by the State (Articles 18 and 71.1 of the Constitution) justifies the need to create legal provisions mitigating the risk of weakening economic bases for the existence of a family having suffered loss as the result of the death of one of the spouses, or even contributing to the strengthening of such bases.

Summary:

In relation to the community of property regime between spouses, legal provisions governing personal income tax (PIT) allow for a choice between the separate taxation of each individual spouse's income and joint taxation based on the so-called marital quotient method. The latter method consists in combining the incomes of both spouses (which is also the case when one of the spouses has no income, or an income below a level at which taxation applies), dividing this sum in half and determining the tax due as twice the amount due on the basis of this calculated half. Since the taxation rules envisage a non-taxable level of income and a progressive rate of taxation (i.e. the higher the income, the higher the tax in percentage terms), application of the marital quotient often allows for a reduction of the tax burden compared with that which would exist in the event that each spouse's income was taxed separately.

The ombudsman challenged Article 6.2 of the Personal Income Tax Act 1991 which, in the wording in force when the judgment was delivered, made the possibility of joint taxation conditional upon, *inter alia*, the fulfilment of two requirements: continuation of the marriage during the entire tax year and submission of an application concerning joint taxation as part of the joint tax return for a given year. These returns are filed by taxpayers following conclusion of the tax year, and by 30 April of the subsequent year at the very latest. The existence of these two requirements meant that any taxpayer whose spouse died during the tax year, or even following its conclusion but prior to the filing of the annual tax return, was unable to benefit from the joint taxation scheme.

The Tribunal ruled that Article 6.2 of the Personal Income Tax Act 1991 did not conform to Article 2 of the Constitution (the rule of law), Article 18 of the Constitution (protection of marriage) and Article 71.1 of the Constitution (the good of the family) of the Constitution insofar as it deprived the following persons of the right to joint income taxation of spouses subject to the community of property regime:

a. taxpayers who were married prior to commencement of the tax year and whose spouse died during that tax year;

b. taxpayers who continued to be married during the entire tax year and whose spouse died following conclusion of the tax year but prior to filing a joint tax return.

The legislator is entitled to a broad discretion when deciding which issues require statutory regulation. However, where Parliament has reached such a decision, statutory regulation of the relevant area must respect constitutional principles.

The acceptance, under certain conditions, of the joint taxation of spouses based on the marital quotient method, as envisaged by Article 6.2 and 6.3 of the Personal Income Tax 1991, does not constitute an exception from the principle of the universality of taxation (Article 84 of the Constitution), nor a privilege or a

type of tax reduction (Article 3.6 of the Tax Ordinance Act 2003) but is one of the two equivalent methods of income taxation of persons under the community of property regime (alongside the method of separate taxation of each spouse's income - Article 6.1 of the Personal Income Tax Act 1991). Joint taxation is justified on the grounds of values expressed in Articles 18 and 71.1 of the Constitution and is also consistent with the regulations of the Family and Guardianship Code, stressing the economic dimension of the community formed by the family, in particular with the obligation of each of the spouses to contribute to fulfilment of the family's needs according to his/her abilities and earning capacity (Article 27 of the Family and Guardianship Code). It also corresponds to the fairness principle in taxation (expressed in Article 84 of the Constitution), according to which the tax burden should correspond to the taxpayer's financial capacity.

With the commencement of the tax year, spouses assume they will have the right to joint taxation and, acting on this assumption, they form plans regarding their level of income and expenditure. Where there exists a considerable difference between the personal incomes of spouses, or where one spouse does not earn any income, application of the marital quotient method is economically beneficial for them and justified from the perspective of the good of the family. However, as a result of the limitations stemming from Article 6.2 of the Act, the forecasting and shaping of spouses' life relations is accompanied by the risk of unexpected adverse financial consequences. The challenged provision allowed for a situation whereby, if the death of a spouse occurred during the tax year or following the conclusion of the tax year but prior to the filing of that year's annual tax return, the surviving spouse was deprived of the possibility to benefit from joint income taxation, contrary to their prior expectations. In enacting such a provision, the legislator adopted an excessively formalistic condition for the applicability of the joint taxation system: namely, requiring both spouses to submit an appropriate application as part of their joint tax return following conclusion of the tax year. Accordingly, the challenged provision created a peculiar trap for taxpayers and, for this reason, the claim that it fails to conform to Article 2 of the Constitution is justified.

It is the legislator's function to amend the challenged provision so as to ensure its conformity with the Constitution. The broad discretion enjoyed by the legislator when shaping the tax regime enables a choice between several possible solutions to the present problem, including for example the right to combine the deceased spouse's income with income acquired by the surviving spouse either during the whole tax year or merely from the commencement of the tax year until the death of the other spouse.

The addressee of the norms included in Articles 18 and 71.1 of the Constitution, formulated as principles of State policy, is primarily the legislator. These provisions do not constitute a basis for the pursuit of individual claims.

Cross-references:

- Judgment K 18/98 of 07.06.1999, *Bulletin* 1999/2 [POL-1999-2-020];

- Judgment P 3/00 of 14.06.2000, *Bulletin* 2000/2 [POL-2000-2-015];

- Judgment SK 21/99 of 10.07.2000, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2000, no. 5, item 144;

- Judgment K 13/01 of 25.04.2001, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2001, no. 4, item 81.

Languages:

Polish, English (summary).

POL-2004-1-010 20-01-2004 SK 26/03

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20-01-2004 / **e)** SK 26/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 11, item 101; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004, no. 1/A, item 3 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
4.15 **Institutions** - Exercise of public functions by private bodies.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Court, decision, forced execution / Bailiff, liability.

Headnotes:

The **rule of law** cannot be applied to a situation where the liability for an unlawful act committed by a private body exercising public functions which is carrying out such functions on its own account (as in the case of a bailiff) is restricted to a certain extent (as for the liability of this private body towards the State), while the State is held liable for actions of public authorities, including the unlawful actions of a bailiff.

A situation in which liability for damage caused by a bailiff acting on his own account as a result of conducting enforcement in an unlawful manner and contrary to constitutional standards would be finally imposed on the State is contrary to the principle of the State's liability for unlawfully caused damage.

Summary:

The Tribunal examined the case as a result of a constitutional complaint.

The right to compensation for unlawful actions of public authorities also applies where the damage is caused by the action of a private body exercising public functions even if this body cannot be regarded as a public authority. This includes a bailiff performing functions imposed by the law on the enforced execution of court decisions. However, there is a difference between a bailiff and a public officer because the bailiff exercises public functions on his own account within the framework of a bailiff's office.

The constitutional right to compensation for damage caused by an unlawful act of a public authority is not only a source of substantive law for the injured person. It is also the constitutional guarantee of the principle of the rule of law that the public authorities act on the basis and within the limits of the law.

Article 769 of the Code of Civil Procedure which regulates the liability of bailiffs for damages is contrary to the principle of the State's liability for damage caused unlawfully by public officers (Article 77.1 of the Constitution).

Cross-references:

- Decision of 04.12.2001 (SK 18/00), *Bulletin* 2002/2 [POL-2002-2-012];

- Decision of 24.02.2003 (K 28/02);

- Decision of 23.09.2003 (K 20/02), *Bulletin* 2003/3 [POL-2003-3-031].

Languages:

Polish.

POL-2004-1-006 09-12-2003 P 9/02

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09-12-2003 / **e)** P 9/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 218, item 2151; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 9/A, item 100 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

1.2.3 **Constitutional Justice** - Types of claim - Referral by a court.
1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
1.4.6 **Constitutional Justice** - Procedure - Grounds.
3.4 **General Principles** - Separation of powers.
4.8.8.3 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - Supervision.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Local self-government, act, legality, supervision / Court, ordinary, primacy.

Headnotes:

Claims of unconstitutionality cannot consist in stating that the provision does not contain a specific regulation, the existence of which would satisfy the applicant. If it were possible to appeal a **rule of law** on the basis that it does not contain regulations which, in the applicant's opinion, should have been incorporated therein, every act or any provision thereof could be appealed on such a basis.

The issuance of a decision in accordance with the expectations of the court filing the referral would give the provision in question a totally new content. The Tribunal would have changed the legal norm, making a significant modification to the Polish legal order. Thus, the Tribunal would have transformed itself from a court of law into a legislative body. Such powers, which would violate the principle of the separation of powers, have not been envisaged for the Tribunal.

Summary:

The Tribunal examined the case as a result of a referral made by the Supreme Administrative Court.

Article 91.1.2 of the Act on Local Self-Government states that a resolution or ordinance of a self-government authority that violates the law is invalid, and the invalidity thereof is decided upon by a supervisory body.

An analysis of the case leads to the conclusion that the principle of the primacy of ordinary courts as a model of control, which was indicated by the court in the referral, is not actually at issue.

The principle of the primacy of ordinary courts pertains to a division of powers within the structure of judicial bodies while the provisions in question concern the power of supervisory bodies to ascertain the invalidity of resolutions or ordinances of local self-government authorities.

The contested provision is not contrary to the principle of the primacy of ordinary courts expressed in Article 177 of the Constitution.

Cross-references:

- Decision of 19.11.2001 (K 3/00);

- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013].

Languages:

Polish.

POL-2003-3-032 29-10-2003 K 53/02

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29-10-2003 / **e)** K 53/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 51, item 797; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 8A, item 83 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.19 **General Principles** - Margin of appreciation.

Keywords of the alphabetical index:

Law, amendment, consecutive / Taxation, legal basis.

Headnotes:

The principle of the **rule of law** requires the legislator to ensure that all adopted legislative acts comply with the standards of good legal drafting, jointly referred to in the Polish doctrine as the principle of appropriate legislation. It is functionally tied to the substantive principles of legal certainty, legal security and protection of trust in the State and its laws. All enacted provisions must be precise and comprehensible to their addressees, without raising doubts as to the scope of duties imposed or rights granted thereby. Where legal provisions exceed a certain degree of ambiguity, this in itself may constitute independent justification for finding that they do not conform to Article 2 of the Constitution.

The principle of appropriate legislation should be especially scrupulously adhered to in the field of tax legislation. The legislator may not leave the authorities responsible for applying such provisions unwarranted discretion in the determination of their subjective and objective scope due to the ambiguous formulation of their content, and thereby subject taxpayers to uncertainty.

Summary:

Article 11 of the Sea Ports and Harbours Act 1996 prescribed a reduced rate of real property tax for property located in ports and harbours. On 30 October 2002 Parliament adopted the Local Taxes and Fees Amendment Act 2002, by which the aforementioned article was repealed. This amendment was presented for the President's signature and signed. It was to take effect as of 1 January 2003. Just three weeks after adopting this amendment, Parliament adopted another one regarding that article - the Sea Ports and Harbours Amendment Act 2002. Article 1.3 of that Act added the hitherto wording of Article 11 of the Sea Ports and Harbours Act as Section 1. Article 1.3 of that Act also added Section 2 to Article 11 of the Sea Ports and Harbours Act. The new section determined the subjective scope of real property tax. Upon receiving this second amending Act, the President, acting in accordance with Article 122.4 of the Constitution, refrained from signing it and referred it to the Constitutional Tribunal for adjudication on its constitutional conformity. The President alleged that simultaneously adopting two different amendments of Article 11 made it impossible to interpret its content correctly, for the reason that the time of entry into force of the consecutive amendments was such that Article 11 would be firstly repealed, and then amended. The effect of such a series of events was not clear, as three interpretations were possible. According to the first, it was impossible to amend a

provision that had already been repealed; therefore, the second amendment would have no legal effect. In light the second interpretation, only Article 11.2 would be inserted, while the hitherto wording of the article would cease to exist. The third interpretation alleged that the legislator's aim was to reinstate the binding force of the original Article 11 as Section 1, in accordance with the rule of *lex posterior derogat legi priori*. It was not possible to remove that discrepancy between the two amendments by using valid rules of legal interpretation. The President claimed that enacting two contradictory provisions at almost the same time left addressees uncertain as to the existence of the lower tax rate; that situation violated the principle of appropriate legislation and trust in the State and its laws, stemming from Article 2 of the Constitution, and also the rules governing the enactment of tax legislation, set out in Article 217 of the Constitution.

The Constitutional Tribunal agreed with the claim concerning the first of the impugned provisions, which was supposed to add the hitherto wording of Article 11 as Section 1. In its reasoning, the Tribunal stated that Article 1.3 of the Sea Ports and Harbours Amendment Act 2002 was a flagrant example of inappropriate legislative technique. As Article 11 would no longer exist at the time that provision was to enter into force, there was no way to add its hitherto wording as "Section 1". There was also no inherent connection between the contents of the "hitherto wording of Article 11" (reduced tax rate) and the new Section 2 (subjects liable to pay the tax). The legislator's aim was not to reinstate the lower tax rate, but to close a lacuna in respect of the subjects liable to pay real property tax.

The Tribunal agreed with the applicant's claim that more than one interpretation of the effect Article 1.3 of the amending Act would have on Article 11 of the Sea Ports and Harbours Act 2002 was viable. The legal uncertainty that would be created by the amendment, though not entirely impossible to eliminate through interpretation, would unavoidably lead to confusion on the part of the addressees. As legal certainty in the sphere of tax law is under special protection, the Tribunal found the aforementioned legal uncertainty to be sufficient reason to declare the provision unconstitutional.

The Tribunal went on to recommend that the Act be returned to Parliament and the defects in the formulation of Article 1.3 be remedied in accordance with the procedure laid down by Article 122.4 of the Constitution. In terms of its substance, the Act was not disputed. The alternative would be for the President to sign the Act with the omission of the unconstitutional provisions (it would enter into force without them).

The claims concerning Article 1.5 and 1.6 of the Sea Ports and Harbours Amendment Act 2002, which regulated matters concerning the entities responsible for port management and the date of entry into force of these provisions, were found by the Tribunal to be unsubstantiated.

By delivering this judgment, the Constitutional Tribunal expressed its profound disapproval of the practice of introducing multiple consecutive amendments of the same provisions, thereby creating a state of legal uncertainty that could only be removed by excessively elaborate legal interpretational techniques. The legal requirements for enactments stemming from Articles 2 and 217 of the Constitution were breached.

Cross-references:

- Decision of 08.11.1994 (P 1/94), *Bulletin* 1994/3 [POL-1994-3-018];

- Decision of 08.03.1995 (W 13/94);

- Decision of 11.01.2000 (K 7/99), *Bulletin* 2000/1 [POL-2000-1-004];

- Decision of 21.03.2001 (K 24/00), *Bulletin* 2001/2 [POL-2001-2-012];

- Decision of 03.04.2001 (K 32/99), *Bulletin* 2001/2 [POL-2001-2-014];

- Decision of 30.10.2001 (K 33/00), *Bulletin* 2002/1 [POL-2002-1-007];

- Decision of 09.04.2002 (K 21/01);

- Decision of 11.02.2003 (K 28/02).

Languages:

Polish.

POL-2003-3-030 16-09-2003 K 55/02

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16-09-2003 / **e)** K 55/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 174, item 1690; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 7A, item 75 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
1.6 **Constitutional Justice** - Effects.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.15 **General Principles** - Publication of laws.
5.2 **Fundamental Rights** - Equality.

Keywords of the alphabetical index:

Acquis communautaire, harmonisation / *Vacatio legis*, necessary length / Constitutional Court, negative legislator.

Headnotes:

Allowing for an adequate period of *vacatio legis* (the time between the promulgation of a law and its entry into force) is a key element in ensuring the proper course of the legislative process, which is in turn one of the foundations of a democratic state subject to the **rule of law**. It is especially important when newly introduced regulations burden their addressees with new obligations and entail legal responsibility for non-compliance therewith.

The principle of protection of interests in due course is not synonymous with the law remaining forever unchanged or with the perpetual existence of certain privileges. The legislator may abolish certain privileges in conformity with the Constitution, provided its actions are predictable and do not surprise the addressees.

Where the substantive content and purpose of the legislation in question are not disputed, the Constitutional Tribunal should resort to invalidating normative acts solely on the ground of insufficient *vacatio legis* only in the most flagrant cases.

Summary:

Before 1 January 2003, radio and television cable network operators were permitted to re-transmit programmes broadcast by Polish and foreign broadcasters without the need to conclude a licensing agreement, provided the programmes in question were available in the given area through traditional or satellite transmitters and the transmission was simultaneous and unaltered in relation to the original broadcast. The holders of distribution rights to these works were entitled to remuneration. This was referred to as the "statutory license", since cable network operators were granted distribution rights by virtue of the law.

The aforementioned privilege of Polish cable network operators was abolished as of 1 January 2003 by an amendment to the Copyright and Neighbouring Rights Act 1994, passed by the *Sejm* on 28 October 2002 and promulgated in the Journal of Laws on 27 November of that year. This change was effected as a result of the

harmonisation of Polish law with the *acquis communautaire,* and it entailed considerable difficulties for cable operators. A particular consequence was that as of 1 January 2003, Polish viewers were deprived of certain foreign television programmes, which were previously retransmitted by cable networks. According to the operators, the change came as a surprise to them, and the mere 34-day *vacatio legis* (the period between the promulgation of the law and its entry into force) did not allow them to adjust to the new legal requirements.

The criticism of the haste with which this change was introduced prompted the Commissioner for Citizens' Rights to bring an application before the Constitutional Tribunal, alleging that the provision determining the date of entry into force of the amendment constituted a breach of Article 2 of the Constitution (the rule of law principle) by the legislator.

The Tribunal did not share that view. In its reasoning, the Tribunal pointed out that the "statutory license" was an exception *(lex specialis)* to the rule that works may be distributed only on the basis of a licensing agreement. Poland's obligation to harmonise domestic copyright regulations with EU legislation by removing that exception was well known for a long time, and cable network operators must have been aware of it and taken it into account. The "statutory license" was also incompatible with the principle of economic freedom, depriving one party of the freedom to control the distribution of its copyrights. The imminent abolition of that privilege must have been obvious to those who benefited from it and, therefore, the claim of being surprised with sudden changes of law was unfounded.

The Tribunal also noted the severe effects that would occur if the new provisions of an otherwise undisputed statute were to be found unconstitutional because of the date of their entry into force. Upon finding that a given *vacatio legis* is too short, the Constitutional Tribunal, acting as a "negative legislator", may only rule on the unconstitutionality of the provision prescribing this period. It may not, however, assume the role of legislator and decree a period that would be, in its opinion, sufficient. Such a ruling deprives the Act in question of its legal effects until Parliament decides on a new date of entry into force. This usually means that the statute enters into force considerably later than originally planned. Where the normative content of the act does not infringe constitutional rights, this is justified only in the most severe cases.

The Tribunal also pointed out that many operators had made considerable efforts to adjust to the new regulations, as the Act was already in force. Striking it down at that point would have amounted to an unjust penalty for those who had respected the new regulations, whilst benefiting those who had disregarded them, thereby undermining the citizens' trust in the State and its laws.

Cross-references:

- Decision of 18.10.1994 (K 2/94), *Bulletin* 1994/3 [POL-1994-3-017];

- Decision of 11.09.1995 (P 1/95);

- Decision of 27.11.1997 (U 11/97), *Bulletin* 1997/3 [POL-1997-3-025];

- Decision of 15.12.1997 (K 13/97);

- Decision of 03.10.2001 (K 27/01), *Bulletin* 2002/1 [POL-2002-1-005].

Languages:

Polish.

POL-2003-2-016 29-04-2003 SK 24/02

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29-04-2003 / **e)** SK 24/02 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 4A, item 33 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.3.1 **General Principles** - Democracy - Representative democracy.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.9.2 **Institutions** - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy.

Keywords of the alphabetical index:

Local self-government, European Charter / Referendum, local, subject.

Headnotes:

The provision of the Act on Local Referendums providing that the citizens of a local community express their will directly by referendum in relation to issues that concern the community and fall within the scope of the competences of local authorities or in relation to issues that concern the revocation of the powers of local authorities is not incompatible with the rule of a democratic state governed by the **rule of law**, the principle of organising local referendums or Article 5 of the European Charter of Local Self-Government.

Summary:

The Tribunal examined a case brought before it in a motion filed by the Ombudsman.

The Tribunal recalled that two principles coexist in relation to democracy at a local level: the principle of the execution of local self-government tasks by local authorities, and the principle of the direct expression of the will of the local community in all matters that are of vital importance to that community.

The Constitution provides that citizens of a local community have the right to express their will by means of two kinds of referendums: the first is fully binding and decisive; and the second reflects the community's opinion or amounts to a consultation, unless the second kind of referendum influences or constructively influences a final decision concerning that local community.

Where an issue is subject to a referendum, the local authority is obliged to take prompt action to implement results of the referendum. That may also mean that the local authority is obliged to express a relevant opinion or to take a stand that complies with the results of the referendum.

The provisions of the European Charter of Local Self-Government complete the constitutional principles on local referendum.

In connection to the above, the provision of the Act on Local Referendums shall be interpreted as not excluding the rights of citizens of the local community to participate in referendums in order to express their opinions on crucial issues relating to social, economical and cultural factors that are common to that community.

Cross-references:

- Decision of 13.02.1996 (W 1/96), *Bulletin* 1996/1 [POL-1996-1-004].

Languages:

Polish. Substantial parts of the judgment are also available in English.

POL-2003-2-015 26-02-2003 K 1/01

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26-02-2003 / **e)** K 1/01 / **f)** / **g)** *Orzecznictwo Trybunalu*

Konstytucyjnego Zbiór Urzedowy (Official Digest), 2002, no. 6A, item 87 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
4.5.2 **Institutions** - Legislative bodies - Powers.
5.1.1.4.2 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Incapacitated.
5.2 **Fundamental Rights** - Equality.
5.3.44 **Fundamental Rights** - Civil and political rights - Rights of the child.

Keywords of the alphabetical index:

Foster family, social aid / Child, disabled, care, costs.

Headnotes:

The State is under an obligation to allocate adequate financial resources to ensure that the constitutional social rights are realised. The question of whether the legislator has adopted the most appropriate regulation of the matter at hand is beyond the competence of the Tribunal. The constitutional review of the mechanism of administering social assistance may only determine whether or not it breaches constitutionally enshrined rights (i.e. equality or justice).

Providing a higher amount of social assistance to foster families of handicapped children than to families of non-handicapped children is sufficient to ensure compliance with obligations under Article 23.2 of the UN Convention on the Rights of the Child.

Even though the Constitution does not explicitly express the principle of the protection of acquired rights, it has been on numerous occasions found to be a part of the general clause of "state subject to the **rule of law**" as contained in Article 2 of the Constitution, along with other closely linked-principles, such as protection of legitimate expectations, legal certainty and trust in the State. The fact that the new Constitution expressly proclaims many rights that have previously been inferred from this general clause while omitting the principle of acquired rights cannot be treated as depriving this principle of its constitutional status. The notion of a "democratic state subject to the **rule of law**" has a well-established legal content and its inclusion in Article 2 is a clear indication of the intention to uphold all the principles contained therein.

The principle of legal certainty requires the legislator to respect existing legal relations. Introducing, by way of enactments of law, substantial changes to the legal system affecting the rights and obligations of private parties that are not objectively justified by the circumstances may infringe the principle of a democratic state subject to the **rule of law**.

The change of the legal means by which social assistance is administered to foster families for covering the cost of upkeep of a child does not in itself contradict the provisions of the UN Convention on the Rights of the Child.

Summary:

The case was initiated by a motion from the Commissioner for Citizens' Rights (Ombudsman) and was joined during proceedings with a question of law referred by a court that concerned one of the provisions under review and cited the same constitutional provision as the basis of review.

The claims of unconstitutionality concerned several provisions of the Social Aid Act 1991 (in the wording given by subsequent amendments) and an executive regulation thereto, which the Tribunal addressed in turn.

According to Article 33c.5 of the Social Aid Act 1990, when a foster child reaches the age of majority, the

foster family is dissolved and, consequently, assistance under Article 33g of the Act is no longer provided. An adult ex-foster child could only be granted assistance under Article 33p.1 of the Act to continue his/her education. This situation was distinctly different from the one concerning children remaining in residential child care institutions who have been allowed to live in the institution after reaching the age of majority, provided they continued their studies at the current educational facility [school]. They were also entitled, like foster children, to financial assistance for continuing their education. Both groups were in an analogous factual situation until they reached the age of majority (differences are irrelevant), when the children in residential care institutions continued to receive state support, which was denied to foster families. There is no justification for the differentiation in the situation of the two groups by depriving foster children of financial support upon them reaching the age of majority, when they continue their education at the current school. That led to the conclusion that the provision under review contradicted the principle of equality.

The second of the provisions under review, Article 33g.2.2 and 33g.2.3 and the executive regulation thereto, had been amended in 2001 and, in effect, financial assistance to foster families of disabled children had been reduced and differentiated according to the age of the child. The Commissioner for Citizens' Rights argued that the assistance provided was too low to meet the needs of those families, since those needs were considerably higher than those of able-bodied children due to high healthcare and rehabilitation costs. The applicant alleged that that contravened Article 23.2 of the UN Convention on the Rights of the Child and provisions of the Constitution regarding the protection of children. The Tribunal found, however, that the assistance provided to foster families of disabled or handicapped children was in any case higher than assistance provided to foster families with non-handicapped children. While the system of providing assistance to foster families with handicapped children was naturally limited by the financial capabilities of the state, the regulations did not infringe any constitutional or international law principles.

Lastly, the Tribunal examined the claim made by both the Commissioner and the District Court in Poznan that Article 55.2 of the Act breached the principle of trust in the state and its laws, the principle of legitimate expectations and the principle of protection of acquired rights. The aforementioned article, introduced in an amendment in February 2000, changed the legal regime governing the provision of financial assistance to foster families from one based on civil-law agreements to one that was solely administrative in nature. As a consequence, all agreements concluded beforehand were rescinded by virtue of law as of 31 December 2000. Both applicants argued that that was an illegitimate intrusion in the sphere of private contracts and that the alteration of obligations between the parties to such contracts should only come about by consensual agreement between both parties, rather than by an Act of Parliament; such an intrusion infringed the guarantees of legal stability in civil law relations and the certainty of legal transactions. The Tribunal in its reasoning stated that although the assistance to foster families had been provided on the basis of civil-law agreements, it had not been in essence a civil-law relationship. The parties had had no discretion in agreeing on the terms of the assistance, especially concerning the amounts to be paid. Those agreements had simply been a type of performance of public services in a form governed by civil law. The Constitutional Tribunal's case-law has on various occasions reiterated that the legislator may choose the form of administering social assistance seen as most beneficial for citizens and best suited to the current economic situation. The effect of the provisions at hand was not to deprive foster families of assistance (although it did reduce its level in many cases), but simply to change the method of granting it. The modification did not therefore infringe the essence of the right to social assistance of the foster child. The Tribunal did not therefore find the existence of an unconstitutional infringement of the principles of the protection of acquired rights and trust in the state and its laws.

Cross-references:

- Decision of 26.04.1995 (K 11/94);

- Decision of 20.11.1995 (K 23/95);

- Decision of 17.06.1996 (K 8/96);

- Decision of 19.12.1999 (K 4/99).

Languages:

Polish. Substantial parts of the judgment are also available in English.

POL-2003-1-008 03-12-2002 P 13/02

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03-12-2002 / **e)** P 13/02 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, no. 205, item 1741; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2002/A, no. 7, item 90 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.12 **General Principles** - Clarity and precision of legal provisions.
4.10.7 **Institutions** - Public finances - Taxation.

Keywords of the alphabetical index:

Tax, law, interpretation / Release, calculation.

Headnotes:

The provisions of the Act on the taxation of natural persons, which set out a method of calculating the amount of a tax release called the "major construction release", are in accordance with the constitutional **rule of law**.

Summary:

The Tribunal examined a case brought before it in a referral by the Highest Administrative Court.

The Tribunal shared the view that the introduction of unclear and ambiguous provisions violates the Constitution. In the Tribunal's opinion, where the vagueness of the provisions is so great as to lend itself to various interpretations, and where that vagueness cannot be cured by the normal means used to cure ambiguity in the application of the law, those provisions may be declared not to be in accordance with the Constitution.

The deprivation of particular provisions of their binding force because of ambiguity should be treated as an extreme measure to be used only when other methods, in particular, an interpretation by the courts, are insufficient.

In the Tribunal's opinion, it was not the rule itself in the provisions in question that was unclear, but its application in relation to particular facts. The vagueness and differences in the interpretation of the provisions in question do not exceed the level that would justify their total elimination from the legal order, as would be the consequences of a declaration of their not being in accordance with the Constitution.

Cross-references:

- Decision of 21.03.2001 (K 24/00), *Bulletin* 2001/2 [POL-2001-2-012];

- Decision of 30.10.2001 (K 33/00), *Bulletin* 2002/1 [POL-2002-1-007].

Languages:

Polish.

POL-2002-3-028 22-05-2002 K 6/02

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22-05-2002 / **e)** K 6/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 78, item 715; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 3, item 33 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.17 **General Principles** - Weighing of interests.
4.10.7 **Institutions** - Public finances - Taxation.
5.1.1.4 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons.

Keywords of the alphabetical index:

Tax, calculation / Tax, capital gains tax.

Headnotes:

The Personal Income Tax Act, as amended, does not provide for a method of calculation and collection of tax on the transfer of sums in capital turnovers. It does not set out the obligations of the taxpayers or paymasters, the deadlines or a method of tax calculation in such a way so as to amount to precise and detailed criteria. The lack of such regulations in the Act should be treated as significant flaw in the amended Act, which creates a threat and uncertainty for taxpayers as to the legal consequences of their actions, and is, as such, contrary to the **rule of law** guaranteed by Article 2 of the Constitution.

Summary:

The Tribunal examined the case brought before it in a motion filed by a group of deputies.

The Tribunal noted that, in accordance with its previous judgments, there is an established view that the legislature has the relative freedom to determine state revenue and expenditure. There is also a fundamental view that the freedom of the legislature to create the substantive content of the tax law is significantly balanced against its obligation to obey the procedural aspects of the rule of law, in particular, the rules of proper legislation.

In the Tribunal's opinion, the requirement that the legislature comply with the rules of proper legislation derives from the constitutional rule of law. This requirement is functionally connected with the rules of legal certainty and security, as well as the citizens' trust in the state and law.

The provisions that amend the Act as to the income tax of natural persons and lump sum income tax on certain profits made by natural persons and that impose income tax on the transfer abroad by natural persons of sums constituting a capital turnover within the meaning of the Foreign Exchange Law are not in accordance with the constitutional rule of law.

Cross-references:

- Decision of 19.06.1992 (U 6/92);

- Decision of 25.04.2001 (K 13/01).

Languages:

Polish.

POL-2002-3-025 10-04-2002 K 26/00

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10-04-2002 / **e)** K 26/00 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 23, item 241; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 18 / **h)** Annotations: *Granat Miroslaw, Przeglad Sejmowy* 2002 nr 4 s. 79-90; Malanowski Andrzej: Droga do Europy czy powrót do PRL. Sluzba panstwu nie koliduje z czlonkostwem w legalnej partii politycznej. Rzeczpospolita 206, 4 IX 2002 s. C3; Macior Wladyslaw: Nie sztuka twierdzic, sztuka uzasadnic. Osoby na okreslonych stanowiskach i pelniace funkcje maja sluzyc panstwu a nie partiom. Rzeczpospolita 195, 22 VIII 2002 s. C3; CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.3 **General Principles** - Democracy.
4.6.9 **Institutions** - Executive bodies - The civil service.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.

Keywords of the alphabetical index:

Public officer, incompatibility / Political party, membership / Freedom of association, scope.

Headnotes:

In the light of the constitutional description of the purposes and tasks of political parties, the right to become a member of a political party should not be viewed through the right of association but through the right to influence national politics by democratic methods.

Deprivation of a group of persons holding public positions or having the status of officers in the public service of the right to participate in political parties does not represent an infringement of the nature of the freedom of association and the right to influence national politics. It creates a limitation of those rights, but it does not constitute an infringement of their nature and is, as such, not contrary to the constitutional **rule of law**.

Summary:

The Tribunal examined the case brought before it in a motion filed by the Ombudsman.

The Tribunal recalled that the applicant claimed that the provisions in question deprived certain groups of citizens of their freedom of association. The applicant, therefore, did not claim that there was a limitation of that freedom but that its essence had been infringed. In the Tribunal's opinion, the aim of freedom of association was to achieve the common development of the citizens' political, social and cultural activity. The Tribunal also mentioned that freedom of association did not have an absolute nature.

The nature of freedom of association is that it grants the citizens a possibility of creating formal organisational links whose purposes and tasks are not regulated by the government. An infringement of the nature of that freedom would occur if certain groups of persons would be prohibited from participating in any form of an organisation.

The provisions in the Act on Military Services of Professional Soldiers, the Public Prosecution Act, the Police Act, the Act on the National Protection Office, the Border Guard Act, the National Fire-Brigade Act, the Act on

Self-Government Appeal Councils, the Act on the Highest Chamber of Review, the Prison Service Act, the Customs Inspection Act, the Act concerning disclosure of work or services carried out by persons holding public posts for the security service between 1944 and 1990, the Political Parties Act, the Personal Data Protection Act, the Act on the National Memory Institute, the Civil Service Act, the Customs Service Act and the Election Act for the Chambers of Parliament prohibiting public officers and persons holding certain public positions from being members of political parties are in compliance with Article 2 of the Constitution setting out the conditions for limitations of citizens' rights.

Cross-references:

- Decision of 12.02.1991 (K 6/90);

- Decision of 19.05.1998 (U 5/97), *Bulletin* 1998/2 [POL-1998-2-010];

- Decision of 21.10.1998 (K 24/98);

- Decision of 20.12.1999 (K 4/99), *Bulletin* 2000/1 [POL-2000-1-003].

Languages:

Polish.

POL-2000-3-023 17-10-2000 SK 5/99

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17-10-2000 / **e)** SK 5/99 / **f)** / **g)** *Orzecznictwo Trybunalu Kostytucyjnego Zbiór Urzedowy* (Official Digest), 2000, no. 7; *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2000, no. 88, item 990 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.18 **General Principles** - General interest.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Abuse of right / Social existence rules.

Headnotes:

Article 5 of the Civil Code include provisions that make particular acts or omissions an abuse of law where they are inconsistent with the social existence rules and the socio-economic purpose of the law. This general rule was not found to be incompatible with the **rule of law** or the constitutional right to a fair hearing.

Summary:

The Tribunal examined the case as a result of a constitutional claim. The applicant claimed that the provisions in question are too general and therefore do not create enough certainty for entities to predict the court's judgement from the point of view of a material justice. The applicant emphasised that the right to a just examination of a case by the court cannot be understood as only a right to formal justice.

The Tribunal emphasised that the challenged provisions of Article 5 of the Civil Code constitute the so-called general rule, which is of high importance for the whole system of civil law, is historically shaped, and has its equivalents in legal systems of other countries. The main feature of such clauses is that they refer to non-legal provisions. The challenged provisions provide for two criteria justifying recognition of a particular act or omission as an abuse of the law: inconsistency with rules of social existence and the socio-economic purpose of the law.

In the Tribunal's opinion, the right to a fair hearing cannot be understood only as a right to access to a court, to the appropriate court proceedings, and to the court's judgement. All these rights are connected with the expectations of interested parties that the judgement of the court is going to be compatible with the content of the material law.

The Tribunal referred to an earlier judgement where it stated that every legal provision which gives a public authority the right to encroach upon citizens' rights and freedoms must be specific. However, bearing in mind that the general rules refer to non-legal provisions of assessment, the requirement of specificity directed to the general rules must take into account the significant features of such clauses and the necessity of their existence in the legal system.

In the Tribunal's opinion, a breach of the requirement of predictability of the court's judgement as a result of the application of the general rule could take place in three situations. First, if the right of understanding of the general rules would be not only of an objective but also of a subjective nature. Second, if the content of a general rule would not give enough guarantees that an interpretation of a judgement would be uniform and strict. Third, if the content of the clause would give a court law-making rights which would allow it to create a new substance to Article 5 of the Civil Code. In the Tribunal's opinion, with reference to the above-mentioned criteria, it cannot be stated that the challenged provisions constitute a threat to the right to a fair hearing because they exclude the possibility of predicting the court's decision. Additionally, it should be ascertained that the foregoing provisions do not violate the requirement of specification of legal provisions expressed in the constitutional rule of law.

Cross-references:

Decision of 07.12.1999 (K 6/99), *Bulletin* 2000/1 [POL-2000-1-001];

Decision of 19.06.1992 (U 6/92);

Decision of 07.06.1994 (K 17/93), *Bulletin* 1994/2 [POL-1994-2-009].

Languages:

Polish.

POL-1999-2-022 16-06-1999 P 4/98

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16-06-1999 / **e)** P 4/98 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1999, no. 5, item 98 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
4.6.9.3 **Institutions** - Executive bodies - The civil service - Remuneration.
5.3.38 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law.

Keywords of the alphabetical index:

Vacatio legis / Remuneration, budget employers, indexation.

Headnotes:

Fixing no longer than seven days' *vacatio legis* for the provision that specifies the remuneration of public prosecutors in a financial year does not infringe the principle of democratic state governed by the **rule of law**.

Summary:

The Constitutional Tribunal decided that a drastic slump in the budget could constitute a reason for restricting, or even cancelling on a temporary basis the indexation of remuneration of budget employees. Certain conditions must be respected, such as the principle of non-retrospective effect of law and the principle of *vacatio legis*. The restriction or temporary cancellation of the indexation should not lead, moreover, to an unfair division of burdens arising from the economic recession for specific professional groups.

In the Tribunal's opinion, the seven days' *vacatio legis*, introduced by the act, is adequate. In consequence, the principle of a democratic state governed by the rule of law has not been infringed.

Languages:

Polish; substantial parts of the resolution are also available in English.

POL-1999-2-020 07-06-1999 K 18/98

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07-06-1999 / **e)** K 18/98 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 1999, no. 52, item 545 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.

Keywords of the alphabetical index:

Tax law, amendments / Taxpayer, differentiation.

Headnotes:

The introduction of amendments to the methods of calculating tax allowances for building contributions is concordant with the principle of a democratic state governed by the **rule of law** and based on principles of social justice.

Summary:

The situation of taxpayers paying for the construction of multi-family building units was more favourable than the situation of persons who had to pay either building or apartment contributions to tenants' housing co-operatives. This concerned in particular taxpayers having bigger incomes and paying higher income taxes.

An assessment of this differentiation from the point of view of social justice would lead to the conclusion that the regulation introducing it is contrary to the Constitution. However, the Constitutional Tribunal decided that in this case the differentiation of the scope of tax burdens of specific groups of taxpayers was not arbitrary

and discretionary. Since the legal situation of the two groups is different in several important respects, it is legally acceptable to differentiate between them. This complies with the principle of social justice according to which equal persons must be treated equally.

Languages:

Polish; substantial parts of the resolution are also available in English.

POL-1999-1-007 16-03-1999 SK 19/98

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16-03-1999 / **e)** SK 19/98 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 19.03.1999, item 212 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Prison, officer, right.

Headnotes:

Preventing prison officers from protecting their infringed rights before the courts is contrary to the constitutional principle of the right of access to courts and the right of appeal from the decision of first instance bodies.

According to the principle which is clearly expressed in the Constitution, everyone has the right to a fair and public trial and to have his case examined before an independent and impartial court. This principle consists mainly of:

i. the right of access to court;

ii. the right to proper court procedure;

iii. the right to a court decision.

Provisions of law depriving individuals of the court's protection are unacceptable in a State governed by the **rule of law**, irrespective of whether they were introduced in disciplinary or labour matters.

Cross-references:

Decision of 08.04.1996 (K 14/96), *Bulletin* 1997/1 [POL-1997-1-008].

Languages:

Polish; substantial parts of the resolution are also available in English.

POL-1998-3-016 15-09-1998 K 10/98

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15-09-1998 / **e)** K 10/98 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1998, no. 5, item 64 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.11 **General Principles** - Vested and/or acquired rights.
5.3.38.4 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Taxation law.

Keywords of the alphabetical index:

Alcohol, sale permits.

Headnotes:

An extension of the duty to pay administrative fees for permits for selling alcohol at premises which were granted such permits before the date of introduction of the fees infringes the principles of *lex retro non agit*, the **rule of law**, maintaining confidence in the law and vested rights.

Summary:

An amendment of the Law on Upbringing in Sobriety and Counteracting Alcoholism introduced the duty to pay administrative fees for permits for the sale of alcohol at all premises including those which were granted such permits before the date of introduction of this provision. The legislator introduced this duty to enable the communes to realise tasks connected with the prevention and solving of alcohol-related problems. In the Tribunal's opinion, however, regardless of whether such a regulation is justified and socially necessary, it may not infringe the *lex retro non agit* principle. Therefore, bodies which were entitled to sell alcohol in a said calendar year without obtaining permission shall not by obliged at the end of that year to pay any administrative fees for the permits.

Cross-references:

Resolution of 12 January 1995 (K 12/94), *Bulletin* 1995/1 [POL-1995-1-003].

Languages:

Polish; substantial parts of the resolution are also available in English.

POL-1998-2-012 26-05-1998 K 17/98

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26-05-1998 / **e)** K 17/98 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1998, no. 4, item 48 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

1.3.4.2 **Constitutional Justice** - Jurisdiction - Types of litigation - Distribution of powers between State authorities.
3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.8.4.1 **Institutions** - Federalism, regionalism and local self-government - Basic principles - Autonomy.

Keywords of the alphabetical index:

Term of office, extension.

Headnotes:

The extension of the period between the terms of office of local self-government bodies by the legislator is consistent with the principle of **rule of law**.

Summary:

The principle of proper duration of the terms of office of State bodies is not stated *expressis verbis* in the Constitution, but may be deduced from the principle of the rule of law. It is created by:

i. the obligation to grant the powers for each body for a defined period;

ii. the fact that this period should not exceed a reasonable time;

iii. the obligation to introduce legal regulations which would enable each body to commence its activity without unreasonable delays, after the termination of the previous term of office.

Both the extension and the shortening of the term of office of local self-government bodies during its duration must be assessed on the basis of the principle of proportionality. That requires deciding whether the results of such regulation remain in adequate proportion to the scope of infringement of the constitutional values. One should take into account that conducting such an assessment requires consideration of the circumstances of each matter. The extension of the period between the terms of office of local self- government bodies is acceptable if the Act introducing such amendment does not extend this period beyond a reasonable time.

Languages:

Polish.

POL-1998-1-002 22-12-1997 K 2/97

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22-12-1997 / **e)** K 2/97 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 1997, no. 159, item 1077; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1997, no. 1, item 72 / **h)** .

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.11 **General Principles** - Vested and/or acquired rights.
5.4 **Fundamental Rights** - Economic, social and cultural rights.

Keywords of the alphabetical index:

Labour law.

Headnotes:

Vested rights shall be protected under the constitutional principle of the **rule of law** and particularly under the principle of maintaining citizens' confidence in the law, which results from that of the **rule of law**.

Summary:

The constitutional principle of protection of vested rights extends to rights vested under the labour law, which should be implemented with strict observation of the constitutional rights and rules. The Constitution does not prohibit the legislator from introducing any amendments to the provisions of the law in force, including introducing amendments making the situation of certain groups of citizens worse. In the Tribunal's opinion, the legislator has the prerogative to choose more accurate solutions, which, obviously, does not exclude the constitutional review thereof.

Cross-references:

Resolutions: K 19/95, P 2/87, U 7/93, U 4/95.

Languages:

Polish.

POL-1998-1-001 17-12-1997 K 22/96

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17-12-1997 / **e)** K 22/96 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1997, no. 5-6, item 71 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.3.38.4 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Taxation law.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Budget, balance, taxation.

Headnotes:

If a provision of law has retroactive effect and the appropriate period of *vacatio legis* is not respected, the following principles, based on the principle of the democratic state governed by the **rule of law**, are infringed: the principle of certainty of the law, the principle of maintaining confidence and the principle of non-retroactive effect of the law.

Summary:

In certain special circumstances the legislator shall be allowed to amend a law in force, despite the fact that such amendments may result in a deterioration in the legal situation of persons concerned by the new provisions of the law.

The fact that the legislator is responsible for the State's income is a material element of the democratic state governed by the rule of law. Therefore, if special circumstances arise in which the necessities of preserving the budget balance and the State's ability to fulfil its obligations become particularly urgent, the legislator may introduce new provisions of law affecting the conditions of the agreements previously concluded.

Due to the reasons stated above, it is extremely important to introduce amendments to the law that are

unfavourable to some groups of the citizens in a manner which will enable those citizens to prepare for their new legal situation. The legislator's freedom in this area is limited both by constitutional regulations and the obligation to respect the values protected by these principles and regulations.

Languages:

Polish.

POL-1997-3-024 25-11-1997 K 26/97

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25-11-1997 / **e)** K 26/97 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1997, nos. 5-6, item 64; *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1997, item 24 / **h)** Kubacki Ryszard: Gloss. Rzeczpospolita 292, 16 XII 1997 p. 15; CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.3 **General Principles** - Democracy.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.1.1.4 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Tax reduction / Tax deduction.

Headnotes:

The legislator's prerogative of forming the material content of tax laws shall be balanced by consideration of the procedural aspects of a democratic State and the **rule of law**.

Summary:

The principle of the rule of law and the principle which follows from it of maintaining the confidence of citizens in the State oblige the legislator to formulate new provisions of tax laws in such a manner that «on-going business», i.e. economic and financial business commenced under laws previously in force, is respected. Therefore:

1. the provisions of the law must set time-limits for specific obligations imposed;

2. the provisions imposing such obligations must allow a reasonable time period before coming into force and shall not be implemented taking into account solely economic considerations;

3. a citizen must factually commence certain economic undertakings affected by the provisions at the time the said provisions are in force (i.e. they cannot have retrospective effect).

Since the amendments to the Law on Natural Persons Tax did not fulfil the aforementioned requirements, it should be treated as infringing the principle of the rule of law and the principle of maintaining the confidence of citizens in the State and in the laws created by it.

Cross-references:

Resolutions of 29 March 1994 (K 13/94), of 24 May 1994 (K 1/94), of 18 October 1994 (K 2/94).
Languages:

Polish.

POL-1996-1-005 13-03-1996 K 11/95

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13-03-1996 / **e)** K 11/95 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1996, no. 2, item 9; *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest) 1996, Vol. I, item 3 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Pre-trial, procedure / Dispute, settlement.

Headnotes:

Although the principle of the **rule of law** (Article 1 of the Constitution) includes the right of access to courts, it does not mean that all existing limitations on access to courts are contrary to the Constitution.
Summary:

The 1995 amendments to the Law on Land Administration and Expropriation introduced a pre-court procedure for settling disputes arising out of or in connection with the new charges for perpetual *usufruct* of State-owned or municipal real estate. Disputes on setting or changing the amount of such charges are submitted to an appeal committee of a relevant Provincial Assembly. A person not satisfied with the committee's decision may appeal against it to a court. The Tribunal declared that such procedure for settling disputes fully protects the rights of interested parties and gives them a right of access to a court. Therefore, neither the principle of the rule of law nor the principle that justice be administered exclusively by the courts were violated.
Supplementary information:

The provisions in question replaced the provision of the 1985 Law on Land Administration and Expropriation that had been found unconstitutional by the Tribunal in its decision of 8 December 1992 (case no. K 3/92).
Cross-references:

Decision of 8 December 1992 (K 3/92), *Bulletin* 1993/1, 31, [POL-1993-1-004].
Languages:

Polish.

POL-1993-1-004 08-12-1992 K 3/92

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08-12-1992 / **e)** K 3/92 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1992, II, 75 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
2.2.1.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and legislative acts.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European Convention on Human Rights and non-constitutional domestic legal instruments.
2.2.2.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
3.10 **General Principles** - Certainty of the law.
4.7.1 **Institutions** - Judicial bodies - Jurisdiction.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Jurisdiction, exclusive competence.

Headnotes:

This decision relates to provisions of the law on the administration of state/public lands designated for construction, which law operated to up-date (and in practice to increase) the fees for the perpetual exploitation of land pursuant to a unilateral declaration of the local administrative authority.

These provisions did not specify the formal conditions under which such declarations could be issued by the competent administrative authority. Nor did the newly-enforced law provide for the possibility of an appeal against the administrative authority's declaration to a court.

Notwithstanding the civil nature of the perpetual exploitation of land (emphasised by the legislature), the change effected by the new regulation had neither been negotiated nor approved by the parties concerned.

The lack of any appropriate administrative procedure of sufficient consistency and clarity to grant the persons concerned the protection of their rights results in a frustration of people's entitlement to legal certainty, which is one of the elements of the **rule of law**.

The absence of any procedure granting citizens the right to appeal against the declaration to a court was declared to be in contradiction with the constitutional principle that justice be administered exclusively by courts and found to be contrary to the provisions of the European Convention for the protection of Human Rights and Fundamental Freedoms and the International Covenant of Civil and Political Rights concerning the right of access to court.

Languages:

Polish.

POL-1993-1-002 26-01-1993 U 10/92

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26-01-1993 / **e)** U 10/92 / **f)** / **g)** *Orzecznictwo Trybunalu*

Konstytucyjnego (Official Digest), 1993, I, 19 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

1.2.2.4 **Constitutional Justice** - Types of claim - Claim by a private body or individual - Political parties.
1.3.5.9 **Constitutional Justice** - Jurisdiction - The subject of review - Parliamentary rules.
2.2.2.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
3.9 **General Principles** - Rule of law.
4.5.4.1 **Institutions** - Legislative bodies - Organisation - Rules of procedure.
4.5.10 **Institutions** - Legislative bodies - Political parties.
5.3.29.1 **Fundamental Rights** - Civil and political rights - Right to participate in public affairs - Right to participate in political activity.

Keywords of the alphabetical index:

Parliamentary group, establishment / Political party, freedom / Rules of procedure, parliament, interpretation.

Headnotes:

The provision of the Rules of the Sejm specifying the minimum number of parliamentary members for a group at 15 is an aspect of the Parliament's autonomy, granted by the Constitution to the Houses in the field of defining their own structures and procedures. The provision is consistent with the constitutional principle of the **rule of law** and with the freedom of political parties.

Limitations on the creation of a group are a consequence of the provisions of the Constitution, which operate to ensure the effective performance of constitutional duties by the Parliament. Differentiation as between the legal status of internal parliamentary groups does not result in an interference with the individual rights of members of Parliament as representatives. The provision in question does not infringe on the freedom of political parties, as the role of a Sejm member - as emphasised by the Tribunal - may be reinforced through the exercise of a free mandate as well as by freedom of political action.

On a point of form, this interpretation of the provision does not indicate that it is contrary to the provisions of the law on the duties and rights of members of the Sejm and of the Senate, which include the right of the members of Parliament to form and join groups. Moreover, the Rules of the Sejm, being a law based directly on the Constitution and serving to supplement its provisions, may determine the arrangement of the groups in the Sejm in a manner consistent with that envisaged in the Constitution, providing always that such Rules do not exceed the limits of Parliament's powers.

Languages:

Polish.

POR-2002-3-009 19-12-2002 509/02

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19-12-2002 / **e)** 509/02 / **f)** / **g)** *Diário da República* (Official Gazette), 36 (Series I-A), 12.02.2003, 905-917 / **h)** CODICES (Portuguese).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.9 **General Principles** - Rule of law.
3.11 **General Principles** - Vested and/or acquired rights.

3.17 **General Principles** - Weighing of interests.
3.19 **General Principles** - Margin of appreciation.
4.5.2 **Institutions** - Legislative bodies - Powers.
5.2.2.7 **Fundamental Rights** - Equality - Criteria of distinction - Age.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
5.4.18 **Fundamental Rights** - Economic, social and cultural rights - Right to a sufficient standard of living.

Keywords of the alphabetical index:

Social protection systems / Income, guaranteed minimum, beneficiary, difference in treatment / Integration income.

Headnotes:

The principle of respect for human dignity, which is embodied in Article 1 of the Constitution and which is derived also from the idea of the democratic state based on the **rule of law**, mentioned in Article 2 and again in Articles 63.1 and 63.3 of the Constitution (which guarantees everyone the right to social security and requires the social security system to protect citizens in all situations in which the means of subsistence or the capacity to work have been lost or impaired), implies recognition of the right to or guarantees of a decent minimum income.

In implementing the right to a decent minimum income, Parliament enjoys the independence freedom, required to choose the appropriate instruments for that purpose. It can shape them according to circumstances and its own political criteria. In the instant case, Parliament might perfectly well take the view that, in relation to young people, the solution adopted should not be to make a grant - and, in particular, not to extend the scope of the social integration income - but to provide other benefits, in cash or in kind, such as study or training grants or apprenticeship wages (at least when they are linked to social integration schemes). The important thing, however, is that Parliament's choice should guarantee the right to a decent minimum income with a minimum of legal efficacy in all cases.

Summary:

The President of the Republic requested a review of the constitutionality of a provision contained in a parliamentary decree which had been submitted to him for promulgation as a law. This text abolished the guaranteed minimum income provided for under the legislation in force and created the social integration income. The doubts with regard to constitutionality concerned the article determining who was entitled to the social integration income, since, according to the legislation in force, persons aged 18 or over were entitled to the minimum income, whereas the new text guaranteed the right to the social integration income only to persons aged 25 or over.

The point at issue was whether, by replacing the entire guaranteed minimum income scheme with the social integration income scheme, Parliament could generally deprive persons of under 25 years of age of the rights which they had previously enjoyed, without any constitutionally based ground justifying such discrimination in relation to persons aged 25 or over. The distinction according to age established by the provision in question was permissible only if it was not arbitrary, in other words if it was justified on reasonable grounds. Consequently, Parliament was not prohibited from making such a distinction if age could be regarded as an important factor for the adoption of other instruments as an alternative to the social integration income. If so, it would be necessary to put forward certain specific aims which it was hoped to achieve in relation to the 18-25 age group, i.e. a particular concern with regard to their integration in the world of work.

It seemed reasonable to assume that priority should be given to preparing young people for full integration in social life, with the emphasis on vocational training, apprenticeship and creation of the conditions for helping them to find their first job, especially as, under the terms of Article 70.1.b of the Constitution, "young people [...] shall receive special protection so that they may enjoy their economic, social and cultural rights", in

particular with respect to "access to a first job, work and social security". That constituted a sufficient constitutional guarantee for the rules applied to them to reflect positive discrimination in this area.

The main question was whether there was a constitutional guarantee of a decent minimum income. A distinction needed to be drawn, however, between recognition of a right not to be deprived of what was regarded as essential to maintain the income required for a decent subsistence minimum, and recognition of a right to ask the state to ensure that minimum, particularly by means of allowances, as suggested by German legal theory and case-law. According to the latter, "the principle of human dignity and the principle of the welfare state give rise to a claim to benefits necessary to ensure subsistence". A guaranteed subsistence minimum included "sufficient welfare benefits", in accordance with the legislation on social welfare, in other words "the state is obliged to guarantee destitute citizens, by means of welfare benefits, the minimum conditions needed to live in a manner consistent with human dignity" (*BverfGE*, 82, 60 (85)).

According to the case-law of the Portuguese Constitutional Court, once the state had accomplished (fully or partly) the tasks imposed on it by the Constitution with a view to implementation of a social right, constitutional observance of that right was no longer only a positive obligation, but also a negative obligation. The state that was obliged to take action to realise the social right must now refrain from jeopardising the implementation of that right.

Generally, legal writers agreed on the need to strike a balance between the stability already achieved in the area of legislative implementation of social rights and Parliament's freedom of adaptation. To strike this balance it would be necessary to distinguish between the different situations arising. In cases where the Constitution contained a sufficiently precise and concrete order to legislate, Parliament's scope of freedom to reduce the level of protection already achieved was necessarily very limited, because it would only be able to do so to the strict extent that the desired legislative change did not result in unconstitutionality by omission. In other circumstances, however, the rule against reducing the level of protection of social rights could only operate in borderline cases, because if democratic alternation of power was to be regarded as more than a purely theoretical concept, it must entail the reversibility of political and legislative choices, even if they were fundamental choices.

In the instant case, there would no longer be any point in considering the question of a prohibition on reducing the level of protection if the conclusion were to be reached that the right to a decent minimum income was guaranteed by the Constitution and that there were no other instruments which could do so with a minimum of legal efficacy. Otherwise there would, after all, be a case of unconstitutionality through violation of that right, independently of the substance of the legislation previously in force. It was important, therefore, to see exactly what the Constitution stated with regard to the right to a decent minimum income.

The question of whether the substance of the right was reduced to the point of infringing the principle of equality was conceptually independent of the prohibition on reducing the level of protection, because it would be considered mainly in terms of the close links between the different situations regulated by the decree in question, and not in terms of a comparison between the treatment which would be applied to them in future and the treatment applied under the rules still in force.

Parliament enjoyed freedom of adaptation in choosing the appropriate instruments for implementing the right to a decent minimum income. It could decide on the "means and amount of assistance", without prejudice to an "essential minimum" which it would always have to provide. This freedom stemmed from the democratic principle which presupposed the possibility of making choices giving a meaning to pluralism and democratic alternation of power, albeit within the limits laid down by the Constitution. Here, it was necessary to strike a balance between the two pillars on which, according to Article 1 of the Constitution, the Portuguese Republic was founded: on the one hand, human dignity, and on the other, the will of the people expressed through elections.

However, the existing legal instruments, whose specific aim was to promote the integration of young people in working life or professional training, conferred no rights on the destitute and did not give young people proper access to the programmes they contained. The provision under review therefore violated the minimum content of the right to a decent minimum income. This right derived from the principle of respect for human

dignity, which, in turn, was recognised by Article 1 of the Constitution and which also derived from the idea of the democratic state based on the rule of law mentioned in Article 2 of the Constitution and again in Articles 63.1 and 63.3 of the Constitution.

In short, the Constitutional Court found the provision to be unconstitutional on the grounds that it violated the right to a decent minimum income inherent in the principle of respect for human dignity.

Supplementary information:

In theory, the question of a prohibition on reducing the level of protection does not arise solely in relation to social rights. On the contrary, the French Constitutional Council introduced the idea of a "standstill effect" with a decision given in the field of fundamental freedoms (Decision DC 83-165 of 20 January 1984), in which it held that the total repeal of an act in this field was not possible unless it was replaced by another offering comparable guarantees of efficacy. It was only much later (DC 90-287 of 16 January 1991) that the Constitutional Council recognised that this standstill effect might also be applicable in the area of economic and social rights, despite legal writers' reservations about its scope.

The present judgment by the Constitutional Court stresses that, in 1988, the European Parliament declared itself in favour of establishing in all the member states a guaranteed minimum income to help ensure that the poorest citizens are integrated into society (*Official Journal of the European Communities,* no. C 262 of 10 October 1988, p. 194); refers to point 10 of the *Community Charter of the Fundamental Social Rights of Workers*; and notes that, in 1992, the European Council approved Recommendation no. 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems.

In addition to the case-law of the German Constitutional Court (Decision of 18 June 1975 - *BVerfGE* 40, 121 (134)), the present judgment is also based on Portuguese constitutional case-law, which is gradually recognising, albeit indirectly, a guaranteed right to a decent minimum income or a subsistence minimum, either in connection with the adjustment of occupational injury pensions (Judgment no. 232/91), or in connection with the exemption from attachment of certain social allowances (Judgments nos. 349/91, 411/93, 318/99, 62/02 and 177/02).

Languages:

Portuguese.

POR-2001-3-003 24-10-2001 470/01

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 24-10-2001 / **e)** 470/01 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.4.5 **Fundamental Rights** - Economic, social and cultural rights - Freedom to work for remuneration.

Keywords of the alphabetical index:

Claim, preferred / Claim, in respect of wages / Wage, right / Vessel, impounding / Confidence in the law, principle / Wage, unpaid / Wage, discrimination.

Headnotes:

Creditors' ranking for payment of their claims out of the proceeds of the sale of a specific item of property - a vessel - must be determined in accordance with Article 578 of the Commercial Code.

The solution resulting from application of Article 578 is not arbitrary, nor does it lack sufficient objective foundation. It reflects the priority given to payment of docking and moorage fees over claims in respect of wages. These fees correspond to services and costs attributable to keeping a vessel in a harbour and are inherent in its normal use. This legislation is also consistent with the principle that Portugal is a democratic state based on the **rule of law**, enshrined in Article 2 of the Constitution, in particular as regards the **rule of law**, together with the principle of confidence in the law.

Summary:

Six Ukrainian nationals, in their capacity as the crew of the vessel "Lanzheron", which had docked in a Portuguese harbour and had been impounded, had filed claims for overdue wages, on the basis of their employment contracts, against the company Old Navy Lda., seizure and sale of whose property had been ordered.

In this specific case the Constitutional Court was asked to decide whether, regarding certain preferential claims on the vessel, the provisions of Article 578.4 and 578.6 of the Commercial Code (included in the chapter on "Creditors' preferential claims and mortgages") were constitutional. The applicants argued that, as a general rule, there must be strict equality between a ship's crew and all other employees. They also maintained that, in comparison with all other claims deriving from employment contracts held by other employees also subject to specific working arrangements, the system provided for in these paragraphs of the Commercial Code did not allow strict equality.

The Constitutional Court noted that, as a result of the ranking determined in Article 578 of the Commercial Code, sums due to the harbour authority in respect of docking and moorage fees took precedence over crews' claims in respect of wages. These sums, on which the law conferred a payment preference, were intended as remuneration for use of public property - harbour facilities - and were a direct consequence of normal use of the property - the vessel - against which a lien was granted. This system, which had the result of giving this tangible guarantee precedence over that deriving from either the Civil Code or the Commercial Code in respect of debts arising from employment relations, put into practice certain principles underlying the civil-law provisions governing the ranking of claims: first, the priority given to certain preferential claims of public authorities; second, the principle whereby certain expenses incurred for the maintenance or use of the property against which the lien was granted must be paid first, taking precedence over other preferential claims.

The Court consequently found that the legislation under consideration was not unconstitutional. This decision endorsed the priority given to payment of certain docking and moorage fees and expenses incurred by a harbour authority over crews' claims in respect of wages. Since the general principle that employees' wage-related claims took absolute precedence did not exist in Portuguese law, there was no inequality that might be reprehensible from a constitutional standpoint between members of a ship's crew and all other workers.

Languages:

Portuguese.

POR-2001-2-001 02-05-2001 187/01

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 02-05-2001 / **e)** 187/01 / **f)** / **g)** *Diário da República* (Official Gazette), 146 (Serie II), 26.06.2001, 10492-10506 / **h)** CODICES (Portuguese).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.

3.16	**General Principles** - Proportionality.
3.20	**General Principles** - Reasonableness.
5.1.3	**Fundamental Rights** - General questions - Limits and restrictions.
5.2	**Fundamental Rights** - Equality.
5.2.1.2.1	**Fundamental Rights** - Equality - Scope of application - Employment - In private law.
5.3.39.3	**Fundamental Rights** - Civil and political rights - Right to property - Other limitations.
5.4.4	**Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.
5.4.5	**Fundamental Rights** - Economic, social and cultural rights - Freedom to work for remuneration.

Keywords of the alphabetical index:

Property, private, right / Enterprise, private / Profession, freedom to choose / Drug, pharmaceutical / Pharmacy, transfer / Pharmacist, profession / Pharmacy, ownership / Health, protection / Proportionality, definition.

Headnotes:

The freedom to choose one's occupation or type of work, which is enshrined in Article 47.1 of the Constitution, is a personal right - not just a guarantee or a basis of economic activity - which consists not only of the negative "right of defence" but also of a positive dimension in relation to the "right to work". Another aspect of the freedom to exercise an occupation is that it must be understood broadly in the sense that, while an occupation (such as that of pharmacist) may be exercised either on a self-employed basis or for an employer, and while both ways of exercising an occupation are important, the choice of one or the other way is itself protected as part of the right established in Article 47.1 of the Constitution.

If this view is taken of the occupation of pharmacist, characterising it as an independent profession (although this should not be incompatible with viewing pharmacists also as shopkeepers), the pharmacy premises consist essentially of the resources and assets, both material and non-material, which permit the establishment and exercise of that occupation - including the performance of quality and toxicity controls on products supplied, manual preparation and the lawful public sale of medicines. That a certain training and certain skills are required in order to be able to exercise the occupation is therefore no more than a professional safeguard. Legal restrictions, be they on access to pharmacy ownership or on the operation of a pharmacy as a business concern, are legitimate as restrictions laid down "in the public interest" or "inherent in the capacity" required of pharmacists.

Since in principle the legislative right to impose conditions on or restrict the exercise of the fundamental rights concerned is unquestionable, it follows that legal regulations conditioning or restricting access to a certain activity or occupation, or to private economic enterprise in a given field, are not unconstitutional unless they can in no way be justified by the specific terms of Articles 47.1 and 61.1 of the Constitution (the latter of which relates to private economic enterprise) or unless they exceed the general limits laid down in Articles 18.2 and 18.3 of the Constitution for legal measures restricting fundamental rights, freedoms and guarantees, namely:

- the requirement that restrictions be necessary and proportionate;

- the requirement that they be general, abstract and non-retroactive;

- the requirement that they respect the essential content of the constitutional principle establishing the right.

In the case at issue, there is no doubt that the restrictions challenged are general, abstract and non-retroactive. Further, it appears unlikely that the essential content of the freedoms referred to above is infringed by the placing of restrictions, in the form of qualification requirements, on the choice and exercise of the occupation of self-employed pharmacist and pharmacy owner. From the point of view of freedom to choose an occupation, then, it also needs to be ascertained whether the restrictions introduced by the legal rules in question can be deemed to be necessary and proportionate.

Today, the legal notion of proportionality, in the broad sense, severely limits the exercise of public authority, to the advantage of personal rights and freedoms. In various decisions, the Portuguese Constitutional Court, too, has already recognised and applied the principle of proportionality, frequently referring to it when examining criminal laws or laws of another kind which made rights subject to conditions or restrictions. As regards restrictions placed on rights, freedoms and guarantees, the proportionality requirement is inherent in Article 18.2 of the Constitution. Yet, as a general principle limiting the exercise of public authority, proportionality may be based upon the general principle of the **rule of law**. There need to be limits which take account of the relationship between public authorities' aims and measures. Legislators and government must adapt their proposals for action to their stated aims, rather than determine which measures they consider to serve no purpose or to be overly restrictive. Moreover, the principle of proportionality, in its broad sense, can be broken down analytically into three requirements linked to this relationship between measures and stated aims: the need to adapt the means to the ends, the requirement that the means be necessary or essential, and proportionality in the strict sense, implying a "just measure".

On consideration of the various aims which the legislator hopes to achieve by means of the regulations whereby pharmacy ownership is reserved for pharmacists and by making it impossible to regard a pharmacy separately from its technical management, it can be concluded that these regulations are neither inappropriate nor unhelpful to the pursuit of these aims. This is true, firstly, of the aims of pharmaceutical activities, since it can reasonably be deduced that these arrangements not only favour the aims of public health, the public interest and pharmacists' professional and ethical independence, but do so more specifically, comprehensively or easily than could any provisions allowing for pharmacies to be freely owned. It is obviously also true of aims which are directly linked to pharmacy ownership - such as the conscientious performance of duties, the owner's or manager's ethical obligations and responsibilities and keeping in check concentrations of ownership in the field of sale of pharmaceutical drugs.

Having examined the cited grounds, it can be concluded that the principles of indivisibility and of reserving ownership for pharmacists are not unreasonable. It can therefore be declared that these arrangements do not contravene the principle of proportionality (or "avoiding excess") - in particular when this principle is combined with the right to property or the freedom to exercise an occupation - as applicable even to restrictions on rights, freedoms and guarantees. Accordingly, as regards the legislator's stated aim of serving the public interest, these restrictions cannot be deemed to be inappropriate, unhelpful or disproportionate, and there is consequently no contravention of the principle of equality.

Summary:

The ombudsman applied for two legislative provisions reserving ownership of pharmacies for pharmacists to be declared unconstitutional. The applicant argued, first, that the legal consequence of these provisions was to place restrictions on the right to private property, which is enshrined in Article 62.1 of the Constitution; and second, that reserving pharmacy ownership for pharmacists was an exclusive business privilege which could not be justified on grounds of public health, since the law, which stipulated that a pharmacy's technical management must be supervised by a pharmacist responsible for the preparation of pharmaceuticals and for the public sale or distribution of medicines or medicinal products, and established the principle of pharmacists' independence for practical purposes, already adequately guaranteed public health protection.

On examination of the purpose of the rules in question and the grounds given for the application, it can be concluded that the principal aim of the application was to obtain an examination of the constitutionality of the rule reserving ownership of pharmacies serving the public for individual pharmacists or to commercial partnerships of pharmacists. The other provisions contested were secondary, or were designed to allow for the hypothetical case where the legal restrictions suddenly lapsed, because a pharmacy was acquired by a non-pharmacist, with undesirable consequences. In addition, the fact that these rules predated the entry into force of the Constitution in no way affects this viewpoint since, according to the application, they were substantively unconstitutional.

The claims of unconstitutionality were therefore as follows:

1. restriction placed on the freedom to transfer property (in breach of Article 62 of the Constitution);
2. restriction placed on the right to private economic enterprise (in breach of Article 61 of the Constitution);
3. breach of the principle of equality (a breach of Article 13 of the Constitution);
4. restriction placed on the freedom to choose one's occupation (in breach of Article 47.1 of the Constitution);
5. breach of the principle of proportionality (a breach of Article 18.2 of the Constitution).

The judgment opened with a brief summary of the basis of Portuguese legal provisions in this area, mentioning their history and conformity with international standards. The tradition whereby pharmacy ownership is reserved for pharmacists and the indivisibility in principle of ownership and technical management have been established in the Portuguese legal system since at least the 1830s. Similarly, in other European countries where pharmacies can be privately owned, ownership is most frequently reserved for pharmacists (either directly or through a company). A notable exception is the "liberal" United Kingdom model, under which anyone (including the companies which operate leading chain stores) may acquire a pharmacy.

In the framework of this abstract *ex post facto* review, the judgment concluding that the legal provisions in question were not unconstitutional obtained ten votes in favour, with two against.

Supplementary information:

In Judgment no. 76/85 the Constitutional Court had previously examined the constitutionality of a number of the provisions in question in relation to property rights and freedom of private economic enterprise. In doing so, it had taken account of the principle of equality and the obligation to adhere to the rule of collective acquisition of the principal means of production and the principle of the elimination of monopolies and of excessively large estates. At the time of the first revision of the Constitution, this obligation had been incorporated into Article 290.f. In that previous judgment, the Constitutional Court had concluded, with three dissenting votes, that the rules in question were not unconstitutional, so none of them were declared unconstitutional.

The present application for a ruling of unconstitutionality raised the following issues: first, the constitutionality of the rules contested and, second, the constitutionality of the rules restricting the transfer of pharmacy operation and the gift of pharmacies (these rules are another consequence of the restrictions placed on pharmacy ownership in the provisions already considered).

The subject of this application, and the majority of the questions of constitutionality which it raised, therefore partially overlapped with the issues resolved in Judgment no. 76/85. Nonetheless, where a judgment has previously been delivered dismissing a claim of unconstitutionality, the court can again rule on the same subject, whether the judgment was given as part of an *ex post facto* or a preventive review. In this regard, there was nothing to prevent an examination of the legal rules claimed in the present case to be unconstitutional, although the court had already issued one ruling on their constitutionality.

Languages:

Portuguese.

POR-1997-2-004 25-06-1997 444/97

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 25-06-1997 / **e)** 444/97 / **f)** / **g)** *Diário da República* (Official Gazette), 167 (Series II), 22.07.1997, 8780-8790 / **h)** .

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
3.10 **General Principles** - Certainty of the law.
5.2 **Fundamental Rights** - Equality.
5.3.38 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law.

Keywords of the alphabetical index:

Amnesty / Political crime / Terrorism, amnesty / Law, general application / Judicial system, self-correction.

Headnotes:

The legal notion of amnesty consistently raises two problems:

1. Is it a legislative act generating standards forming an integral part of the system of the **rule of law** and, as such, subject to the jurisdiction of the Constitutional Court?

2. Should the question of the constitutionality of the purposes of an amnesty be examined in relation to the State's aims as a whole or solely in relation to the specific aims of criminal policy?

The theories of exemption and of just cause properly linked amnesty with theories of law and the **rule of law** by defining the many forms of pardon such as self-correction of the judicial system (*Selbstkorrektur der Gerechtigkeit* in Jehring's famous phrase) and by explaining how exemption from the law may serve the purposes of the **rule of law**. If a just cause does exist, then any amnesty may be given general effect; therefore the scope of the law of amnesty is general not only in the sense that it defines the relevant facts by means of generic categories but also in the sense that, where there is a just cause, the amnesty has a general nature (and therefore is a substantive law) because by the same token it is a rational proposition and hence capable of being given general effect.

The argument that the law of amnesty (whose constitutionality, in terms of reasons and *rationale* must be weighed against the principle of equality) presupposes an exemption from legal sanction is compatible with the «autonomy» of the power to «grant amnesties and general pardons» in relation to the power to «legislate on all matters» (according to the terms of the Portuguese Constitution). Moreover, even though the principle of equality is applicable to the law of amnesty, such an application is nevertheless compatible with the inevitable inequality of always judging the facts in terms of the legal sanction (which is general and, in theory, the subject of the amnesty).

The terms of an amnesty automatically suspend the application of a provision of the criminal law in relation to part of the facts provided for in the criminal norm. The extent of this part depends, above all, upon the fact that the amnesty is temporary and is related to its original circumstances. Nevertheless, this does not mean that all circumstances are temporary. Only some have to be temporary, in order to avoid unequal treatment between facts preceding and subsequent to the amnesty.

Further, it is necessary to indicate the grounds for granting amnesty - explaining the advisability of the legal act of pardon as a whole - as well as the grounds for each provision contained in the act of pardon. Substantive unconstitutionality could affect only each individual provision of the law of amnesty (even though the question of unconstitutionality may be derived from the whole body of circumstances specific to the pardoned acts).

Summary:

In this case, the Constitutional Court was required to rule on the decision of a criminal court, which had refused the application of Act no. 9/96 of 2 March on the grounds of unconstitutionality. This Act had pardoned politically motivated offences committed between 27 July 1976 and 21 June 1991 and had been approved by a majority of deputies in the Assembly of the Republic in the exercise of its power to «grant amnesties» embodied in Article 164, as part of its «political and legislative powers».

The Act on amnesty had been initiated (in the form of a bill) by the Government re-echoing, *inter alia*, the President of the Republic's address to the Assembly on this matter in which he had emphasised that this was the second opportunity to approve an amnesty aimed at the political resolution of the case known as *Caso Frente de Unidade Popular / Forças Populares 25 de Abril*. (*FUP/FP 25 DE ABRIL* was a semi-clandestine, leftist organisation which advocated the use of violence to establish a people's revolutionary regime. One of its members, and perhaps its leader, was Otelo Saraiva de Carvalho, the military commander of the *coup d'Etat* of 25 April 1974 and a former candidate for the post of President of the Republic.)

Two grounds had been invoked during the legislative procedure concerning Act no. 9/96 to justify the amnesty. First, the amnesty sought to rectify the law, since the legal complexity of *Caso FUP/FP 25 de Abril* made a judicial solution extraordinarily difficult. Second, the amnesty aimed to promote peace after a historical period of politically motivated violence, and such an amnesty had long been advocated in order to consolidate democracy and to foster political stability and social peace.

However, the constitutionality of the above-mentioned bill had immediately been challenged in the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic, on the basis of three legal arguments:

a. the text only allowed for the amnesty of certain crimes, committed in a particular period, within the context of a particular terrorist organisation and therefore violated the principle of equality established by Article 13 of the Constitution;

b. the crimes concerned (armed robbery, kidnapping, holding persons against their will and even murder and similar crimes) were not amenable to amnesty;

c. the law related to a single terrorist organisation, whose members would thus receive privileged treatment because of their political and ideological beliefs - contrary to the explicit provision of Article 13.2 of the Constitution.

However, the (left-wing) majority of this Committee and also the plenary session of the Assembly of the Republic decided that this bill was indeed constitutional. The legal argument used in the parliamentary debate reflected the controversy prevalent throughout the development of Portugal’s legislation and case law on amnesties. The Constitutional Court considered all these points in detail and unanimously concluded that the amnesty Act concerned was constitutional.

The Constitutional Court decided that the Law no. 9/96 on amnesty does not violate the Constitution.

Supplementary information:

The Constitutional Court had already settled several questions of unconstitutionality in the numerous criminal proceedings arising from *Caso FUP/FP 25 de Abril*. Furthermore, in its Judgement 184/86 (published in the Official Gazette, *Diário da República*, Series II, of 21.05.1996) - which had been considered in plenary assembly since the decision also concerned the powers of the Constitutional Court itself in relation to other courts - it had had cause to reaffirm its previous case-law on the unconstitutionality of certain standards of criminal procedure, concerning in particular appeals on grounds connected with the facts of a case.

Languages:

Portuguese.

POR-1997-1-001 08-01-1997 1/97

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08-01-1997 / **e)** 1/97 / **f)** / **g)** *Diário da República* (Official Gazette), 54 (Series I-A), 05.03.1997, 966-987 / **h)** CODICES (Portuguese).

Keywords of the Systematic Thesaurus:

1.3.4.2 **Constitutional Justice** - Jurisdiction - Types of litigation - Distribution of powers between State authorities.
3.4 **General Principles** - Separation of powers.
3.10 **General Principles** - Certainty of the law.
4.5.7 **Institutions** - Legislative bodies - Relations with the executive bodies.
5.2 **Fundamental Rights** - Equality.
5.4.2 **Fundamental Rights** - Economic, social and cultural rights - Right to education.

Keywords of the alphabetical index:

Entrance examination, university / Quota / Reserved administrative powers / Powers, separation and interdependence, principle.

Headnotes:

The idea of «general powers reserved for the administration» is not in keeping with the meaning currently given to the principles of the **rule of law** and of the separation and interdependence of powers; nor does this ensue from the text of the Constitution. Under the Constitution, the general principle of the separation and interdependence of powers establishes a rationale of co-operation and co-ordination between State powers and bodies.

Although the Constitution assigns the key elements of the executive function to the Government as the highest organ of public administration, areas which may be the subject of administrative activity (eg issuing of the regulations needed to implement laws) may also be the subject of a law passed by the Assembly of the Republic.

The Constitution does not uphold the argument that the administration has «reserved powers in respect of specific functional matters» since the assignment of a specific field of action to the executive, as a corollary of the separation and interdependence of the organs of supreme authority, does not imply that certain matters are reserved originally and absolutely for the executive; it simply implies the power to choose from among several possible decisions, in an area not dealt with in detail in parliamentary legislation.

«*Maßnahmegesetze*» (laws not making general provisions but dealing with special individual cases) are not necessarily at variance with the separation of powers because of their form (ie the fact that they are not abstract and general in nature), although - like any other law - they can violate the principle of equality.

Summary:

The case concerns an application for prior scrutiny of constitutionality made by the President of the Republic, who argued that the provisions in question could have an adverse retrospective effect on the rules governing the national university entrance examination for the 1996/1997 academic year, through the creation of additional places for specific individuals by the Assembly of the Republic.

The provisions in question were contained in a decree submitted to the President of the Republic for enactment in the form of a law, having been approved with the support of all parliamentary opposition parties

and notwithstanding the opposition of the deputies of the Socialist Party (the party in government, which, however, has only a relative majority).

The President of the Republic stated as the first ground of his application the principle of the separation and interdependence of powers, laid down explicitly in Article 114 of the Constitution. He submitted several possible arguments:

a. the Assembly of the Republic could be regarded as encroaching, by way of legislation, on core administrative functions;

b. independently of the idea of «general powers reserved for the administration», the Assembly of the Republic could be regarded as having encroached on the area of administrative powers which the Constitution assigns specifically to the Government, thus violating the principle of the separation and interdependence of powers, which represents both a constitutional guarantee of the powers reserved specifically for the administration and the imposition of functional limits on the legislature;

c. the Assembly of the Republic could be regarded as having violated the principle of the separation and interdependence of powers because, without an adequate legal basis and without prior legal authority, it generated a crisis in the Government's constitutional function as the highest organ of public administration.

The President's second complaint concerned a possible violation of the principle of equality since the provisions under scrutiny seemed to establish situations of advantage and discrimination, without an adequate substantive basis.

Lastly, the President of the Republic alleged a possible violation of the principle of the protection of the trust and legitimate expectations of citizens as a corollary of the principle of the democratic state governed by the rule of law since there would be retrospective application of special rules.

In its final decision, the plenary assembly of the Constitutional Court ruled that the provisions under scrutiny were not unconstitutional with reference to the principle of the separation and interdependence of the organs of supreme authority, but that the first two articles of the decree concerned were unconstitutional because, taken together, they conflicted with the principles of legal certainty and equality (particularly the principle of equality of access to higher education). As a result, it also ruled that the other provisions of this decree were unconstitutional.

Supplementary information:

Several judges issued a dissenting opinion on some of the questions of unconstitutionality.

The constitutional provisions referred to were Articles 114, 185 and 202 of the Constitution (separation and interdependence of organs of supreme authority, definition of the Government, administrative powers of the Government respectively) and in particular - since they were referred to explicitly in the final decision - Articles 2, 13 and 76 of the Constitution (democratic state based on the rule of law, principle of equality, university and access to higher level education respectively).

Languages:

Portuguese.

POR-1994-3-015 28-09-1994 529/94

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28-09-1994 / **e)** 529/94 / **f)** / **g)** *Diário da República* (Official Gazette) (Series II), 20.12.1994 / **h)** .

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
4.7.4.3 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel.
5.2 **Fundamental Rights** - Equality.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.19 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Equality of arms.

Keywords of the alphabetical index:

Civil procedure.

Headnotes:

The right of access to the law and to the courts laid down in the Constitution requires efficient and effective judicial protection.

The right of access to the courts derives from the principle of a democratic State governed by the **rule of law** (and consequently also from the principle of equality) and entails in order to guarantee a fair trial the principles of the equality of the parties and of the *inter partes* procedure.

Summary:

A constitutional appeal was referred to the Court by a member of the public who submitted that the provision of the Code of Civil Procedure establishing a difference of position between the «party» represented by the public prosecutor (i.e. the State) and the other «party» in respect of *ónus impugnação especificada* (the facts not contested by one party are considered to be proven, unless the party in question is public prosecutor) violated the on the right of access to the law and to the courts as well as the principle of equality of the parties in civil proceedings and Article 6 ECHR.

The Court maintained that the duties and the status of the prosecuting authorities justified their exemption from the rule that uncontested facts were considered to be proven. The aforementioned discrimination was therefore neither arbitrary nor unjustified.

Supplementary information:

Most of the Court's huge body of case-law on procedural safeguards concerns criminal procedure.

Languages:

Portuguese.

POR-1993-1-007 10-03-1993 174/93 (date incorr.)

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 10-03-1993 / **e)** 174/93 (date incorr.) / **f)** / **g)** *Acordãos do Tribunal Constitucional* (Official Digest), Vol. 24, 57-175 / **h)** .

Keywords of the Systematic Thesaurus:

3.7 **General Principles** - Relations between the State and bodies of a religious or ideological nature.
5.2.2.6 **Fundamental Rights** - Equality - Criteria of distinction - Religion.

5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.
5.3.20 **Fundamental Rights** - Civil and political rights - Freedom of worship.
5.4.1 **Fundamental Rights** - Economic, social and cultural rights - Freedom to teach.

Keywords of the alphabetical index:

Concordat / School, non-religious / Education, religious / Religion, compulsory subject.

Headnotes:

The principle of the separation of state and church is enshrined in the Constitution as part of freedom of religion; the state must therefore remain neutral in religious matters. It must not act in a sectarian manner, nor even give itself the right to organise education and culture along religious lines or to organise and support denominational state education. In other words, a democratic state governed by the **rule of law** may not impose a particular theory of humanity, the world and life on its citizens.

The principles of the separation of state and church and non-denominational state education must not, however, preclude all co-operation between the state and churches or other religious communities. The state even has a responsibility to engage in such co-operation, in view of the positive dimension of religious freedom and its duty to co-operate with parents in the education of their children, but must do so within the limits imposed by the principles of state religious neutrality and non-denominational state education.

Although Catholic religion and moral standards are taught as a school subject by primary school teachers themselves, this is not the state's responsibility, despite a symbolic value that might suggest otherwise. First, the subject is taught only by those teachers who agree and have been nominated by the church; second, such instruction is not wholly prohibited by the principle of separation; finally, it does not require the teacher in question to impart a particular theory of humanity, the world and life based on the principles of the Christian faith in the teaching of other subjects.

The teaching of Catholic education, moral standards and religion, which is part of the teacher training syllabus, is an optional subject for which the Catholic Church is responsible, and its inclusion in the syllabus does not have to be approved by the relevant organs of each training college.

Summary:

A group of national MPs asked the Constitutional Court to declare a number of legal rules set out in two Government orders (*Portaria* no. 333/86 of 2 July and *Portaria* no. 831/87 of 16 October) unconstitutional, with universal binding force, on the grounds of an alleged violation of several provisions of the Constitution, particularly the constitutional principle of the separation of church and state, owing to:

a. the teaching of Catholic religion and moral standards as a school subject by primary teachers themselves;

b. the extension of this subject to state higher education institutions;

c. training for teachers in the teaching of Catholic religion and moral standards, the inclusion of such training among lecturers' duties and their appointment by the state on the proposal of the Catholic Church.

By 7 votes to 6, the Court decided that the legal rules at issue were not contrary to the Constitution.

Supplementary information:

In particular, the two Government orders (*Portaria* no. 333/86 of 2 July and *Portaria* no. 831/87 of 16 October) at issue in this judgment contain implementing provisions for Legislative Decree no. 323/83, the

constitutionality of which had been confirmed by judgment no. 423/87, analysed above [POR- 1987-R-001].
Languages:

Portuguese.

ROM-1998-2-002 16-10-1997 394/1997 Decision on an objection alleging the unconstitutionality of the provisions of Law no. 3/1974 on the press

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16-10-1997 / **e)** 394/1997 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Law no. 3/1974 on the press / **g)** *Monitorul Oficial al României*(Official Gazette), 46/02.02.1998; *Curtea Constitutionala, Culegere de decizii si hotarâri 1998* (Official Digest), 355, 1998 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.
5.3.31 **Fundamental Rights** - Civil and political rights - Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Human dignity, violation / Media, press law, violation, definition / Offence, classification / Insult / Defamation.

Headnotes:

The rule-making, social and political content of Law no. 3/1974 (Press Act) was contrary to the provisions of the December 1991 Constitution and the law was therefore repealed under Article 150.1 of the Constitution. Human dignity is violated by insult and defamation. Human dignity, being enshrined as a supreme value in Romania, a State governed by the **rule of law**, is protected by the provisions of Article 30.6 of the Constitution and by the provisions of Articles 205 and 206 of the Criminal Code, whose guarantees cover insult and defamation through the press.

Summary:

An objection alleging the unconstitutionality of Law no. 3/1974 (the Press Act) was referred to the Constitutional Court by a lower court.

The referral stated that in the preliminary complaint the injured parties had requested that criminal proceedings be instigated against the defendants, under Articles 205 and 206 of the Criminal Code for insult and defamation and under Law no. 3/1974 for publishing insulting and defamatory material about them in the newspaper «*Evenimentul de Iaszi*».

In their memorial the defendants contended that the provisions of Law no. 3/1974 were unconstitutional as there was currently no law establishing press offences as envisaged in Article 30.8 of the Constitution.

In its opinion on the unconstitutionality objection the lower court submitted that while Law no. 3/1974 had not been expressly repealed, it had been implicitly repealed by the provisions of Article 150.1 of the Constitution. Under Article 30.6 of the Constitution freedom of expression was not to be prejudicial to the dignity, honour and privacy of the person, nor to the right to one's own image: nevertheless, paragraph 8 of the same article stated that press offences would be established by law. As no law on press offences had been promulgated,

the penalties for insult and defamation which the Criminal Code prescribed were contrary to constitutional law, which classified press offences as offences of lesser seriousness.

In the Government's view, the matters with which the criminal proceedings were concerned came under Articles 205 and 206 of the Criminal Code rather than Law no. 3/1974, and the objection alleging unconstitutionality was therefore irrelevant.

In support of this opinion it pointed to the provisions of Article 279.3 of the Code of Criminal Procedure: these referred to offences provided for by «Article 205 and Article 206 of the Criminal Code, committed in the press» or in any other of the mass media.

In addition, the Government claimed that the lower court's argument that the Criminal Code penalties for insult and defamation in the press were unconstitutional because the Constitution classified such press offences as lesser offences, could not be accepted. Bearing in mind that current legislation did not recognise the threefold classification of offences as serious crimes, lesser offences and petty offences, Article 30.8 of the Constitution could not be taken to classify offences committed in the press as a particular category of offence. On the contrary, since Article 30.8 dealt with «civil liability for any information or creation made public», it followed from the argument that press offences were «established by law» that the passage referred to civil offences, which consequently entailed civil liability of the publisher, director, author, producer or the owner of the radio or television station or other mass medium.

After examining the documents in the file, the Constitutional Court ruled as follows:

Although Law no. 3/1974 predated the 1991 Constitution, the Constitutional Court was competent to rule on the unconstitutionality objection.

The referral to the Constitutional Court had been made on the ground of non-observance of Article 23.2 of Law no. 3/1974. This stated: «If, during trial of a case, the appointed court or one of the parties argues that a law or an order on which the case depends is unconstitutional, the constitutionality issue shall be referred to the Constitutional Court for a ruling». An objection of unconstitutionality could therefore only be raised, and the court could only refer it to the Constitutional Court, if the objection was to a provision of a law or an order on which the outcome of the case depended.

The present case was a criminal one. The fact of using the press as a vehicle for insult and defamation was irrelevant to the offence and the legal context. That was merely the manner of commission, and in law the offence was not conditional on using a particular procedure or method. This also followed from the provisions of Article 279.3 of the Code of Criminal Procedure, which stipulated that the preliminary complaint was also to be lodged directly with the judicial authority «in the case of offences provided for in Article 193 and Article 206 of the Criminal Code which are committed through the press or another of the mass media».

Law no. 3/1974 was scrutinised even though it had no bearing on the offences with which the proceedings were concerned. The defence counsel, who based the unconstitutionality objection on the fact that the material which had given rise to the charges of insult and defamation had been committed in the press, had submitted: «Obviously the injured parties invoke the provisions of Law no. 3/1974, and plainly they have not invoked, and had no reason to invoke, any other text than the Criminal Code. The judicial authority regards offences committed by means of the press as a particular category of offence rather than what they are in reality, namely, as in the present case, offences against the person in criminal law, which should be applied and not evaded on the pretext that insult and defamation are not punishable when committed by the press.»

Although the appeal to Law no. 3/1974 and its alleged unconstitutionality was misplaced, it should be noted that the Constitutional Court had ruled on the constitutionality of certain provisions of that law in Decision no. 8 of 31 January 1996, made final by Decision no. 55 of 14 May 1996, and had found them to be constitutional. In Decision no. 8, the Constitutional Court had rejected an objection alleging the unconstitutionality of provisions regarding the right of reply (Article 74.2 of Law no. 3/1974) in connection with a document published by a newspaper. On that occasion the Constitutional Court had ruled: «The right of reply has the force of a constitutional right corresponding to the freedom to express opinions, regardless of the form in

which it is exercised. It can be considered to be closely connected to the provisions of Article 30.8 of the Constitution, which regulates civil liability for information made public». The constitutional right concerned came under the law on the press, and it was for that reason that «in principle, even at the current stage of legislation, the regulations on the right of reply contained in Law no. 3/1974 satisfy the constitutional requirements contained in the Constitution».

In the light of the foregoing, the conclusion must be that, while the great majority of its provisions, by virtue of their social and political content, were contrary to the 1991 Constitution and had been repealed by Article 150.1 of the Constitution, Law no. 3/1974 could not be regarded as unconstitutional in its entirety.

The Constitutional Court rejected the objection alleging the unconstitutionality of Law no. 3/1974.

Languages:

Romanian.

ROM-1995-1-001 04-01-1995 1/1995

a) Romania / **b)** Constitutional Court / **c)** / **d)** 04-01-1995 / **e)** 1/1995 / **f)** / **g)** *Monitorul Oficial al României*(Official Gazette), 66/11.04.1995; *Curtea Constitutionala, Culegere de decizii si hotarâri 1995* (Official Digest), 376, 1995 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

4.7.4.3 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel.
4.7.4.3.1 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel - Powers.
4.7.4.3.6 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel - Status.
5.3.13.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope.
5.3.13.1.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Civil proceedings.

Keywords of the alphabetical index:

Civil Procedure, guarantee.

Headnotes:

In that it limits State Counsel's right to take part in proceedings solely to cases relating to «the defence of the rights and lawful interests of minors and persons deprived of legal capacity and other cases provided for by law», Section 45.1 of the Code of Civil Procedure is at variance with the Constitution. This being the case, Article 130.1 of the Constitution, whereby «in the judicial field State Counsel represents the general interests of society and defends the **rule of law** and citizens' rights and freedoms» is directly applicable in such matters.

The requirements of the Constitution are no less binding than directly applicable provisions of a law or contract, even where constitutional law makes reference to ordinary law. The legislator cannot exceed the constitutional limits set in this way without adversely affecting the very scope of the provisions of the Basic Law.

Summary:

The Constitutional Court was asked to rule on the constitutionality of Section 45 of the Code of Civil Procedure, which states:

«The public prosecutor may bring any action, other than those that are strictly personal, and participate at any stage in any proceedings, should this be necessary to protect the rights and legal interests of minors and persons subject to a guardianship order and in other cases provided for in law.

In cases where the public prosecutor has brought the action, the holder of the disputed right shall participate in the proceedings and, where appropriate, have recourse to Articles 246 following and 271 following of the present code.

The public prosecutor may, in circumstances provided for in law, use available remedies and apply for decisions to be implemented.»

The aforementioned article was found to conflict with the Constitution, since it limits the public prosecutor's participation in proceedings, whereas Article 130.1 of the Constitution provides that, in judicial proceedings, the public prosecutor shall protect the legal system and citizens' rights and freedoms.

The public prosecutor's participation in civil proceedings does not affect the courts' power to decide cases brought before them, judicial independence or the fact that the courts are subject only to the law. The relevant constitutional provision does not consider the public prosecutor to be the advocate of one of the parties to the proceedings. His task is to ensure and supervise respect for the law, particularly in cases affecting citizens' interests. The provisions of Section 45.1 of the Code of Civil Procedure are therefore unconstitutional in that they restrict the public prosecutor's right to participate in all proceedings and at all stages of the proceedings. As a result, the provisions of Article 130.1 of the Constitution shall be directly applicable in these circumstances.

Cross-references:

In decision no. 26 of 21 March 1995 (*Monitorul Oficial* no. 66/11.04.1995) the Court dismissed an applicant's appeal.

Languages:

Romanian, French (translation by the Court).

SVK-1999-C-002 27-04-1999 II. ÚS 4/99

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 27-04-1999 / **e)** II. ÚS 4/99 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 24/99 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
5.3.5.1 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Appeal, extraordinary, exclusion / Court, decision, stability / Decision, final and binding, appeal / *Res iudicata*, exception.

Headnotes:

In light of the principle of legal certainty and the **rule of law**, it is possible to allow for the submission of appeals against enforceable rulings only in exceptional circumstances and under strictly determined conditions.

The failure of the Supreme Court to observe the statutorily determined conditions in dealing with appeals against enforceable rulings results in the violation of the freedom from unlawful detention or prosecution.

Summary:

The petitioner filed a petition with the Constitutional Court in which he alleged that his freedom from unlawful detention as well as his right of access to a court had been violated when the Supreme Court annulled the decision of the prosecutor to discontinue criminal proceedings instituted against him. Pursuant to the applicable regulations, the Supreme Court was authorised to annul the contested decision only if an appeal had been filed within six months of the contested decision. In the case at hand, however, the competent public prosecutor had filed the appeal only after the above period had expired.

In response to the Constitutional Court's request for submission of an official statement on the petition, the Supreme Court argued that it lacked the authority to comment on any of its decisions and, moreover, could not be made a defendant in the proceedings at the Constitutional Court. The Constitutional Court, however, pointed out that the Constitution did not give the government authorities any competence which they could apply to the detriment of the citizens' rights and freedoms. Therefore, if any agency by means of its action, or failure to act, infringes upon a given right, it performs its competencies in violation of the Constitution and, consequently, the Constitutional Court is competent to review any such issue. In conclusion, the Constitutional Court referred to the standards adopted by the European Court of Human Rights which were applicable to the case at hand, held that the petitioner's freedom from unlawful detention had been violated, and emphasised the obligation of the national authorities concerned to remedy the situation in accordance with its findings.

Languages:

Slovak.

SVK-1998-1-003

05-02-1998 I.US 3/98 Case of interpretation of Constitutional provision in conflicting situation

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 05-02-1998 / **e)** I.US 3/98 / **f)** Case of interpretation of Constitutional provision in conflicting situation / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), 49/1998, 334, in brief; to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.13 **General Principles** - Legality.
4.5.2 **Institutions** - Legislative bodies - Powers.
4.6.2 **Institutions** - Executive bodies - Powers.

Keywords of the alphabetical index:

State authorities, conflict / State authority, respect of treaties / State authority, respect of domestic legislation.

Headnotes:

Any public authority in a State governed by the **rule of law** is obliged to follow the Constitution, laws and subordinate legislation without exceeding the limits laid down by the law.

Summary:

The President of the Slovak Republic requested an interpretation of Article 2.2 of the Constitution, according to which «State bodies may act solely in conformity with the Constitution. Their actions shall be subject to its limits, within its scope and governed by procedures determined by law».

The Court ruled that Article 2.2 of the Constitution is respected only if the State authority acts within the limits laid down by the law and that there can be no exception to the requirement for such conduct. At the same time, the State authority must behave in the manner prescribed by law. This constitutional requirement is valid even if the State authority shares the opinion that some other State authority did not act in conformity with the Constitution. Presumed unconstitutional conduct by one State authority is never a reason for allowing another State authority to overstep the limits laid down by law. All this is based on the principle of the rule of law. The essence of a State governed by the rule of law is the subordination of any State authority to the Constitution and law. This, however, does not mean that the State authorities are subordinated exclusively to the Constitution. If, as is the case here, the Constitution so provides, the State authorities are also obliged to follow international treaties (Articles 11 and 144.2 of the Constitution), governmental decrees (Article 120.1 of the Constitution) and all other domestic legislation.

Languages:

Slovak.

SLO-2004-2-002

20-05-2004 U-I-296/02

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 20-05-2004 / **e)** U-I-296/02 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 68/04 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (English, Slovene).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.16 **General Principles** - Proportionality.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.20 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Adversarial principle.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.

Keywords of the alphabetical index:

Property, claim, securing, court order, interim.

Headnotes:

Human rights and fundamental freedoms as well as the principle of a State governed by the **rule of law** laid down by the provision of Article 2 of the Constitution ensure every individual freedom and protection against indiscriminate, unlawful and excessive interferences by the bodies of the State. Individuals are ensured freedom and protection against interferences by criminal law enforcement bodies unless the individuals themselves have interfered with the legally protected welfare of others or of society as a whole in a manner

prohibited and punishable by criminal law. Whether an individual has violated the legally protected welfare of others is to be established in criminal proceedings. Interferences by the criminal law enforcement bodies of the State with an individual's human rights and fundamental freedoms are in principle allowed only in cases where a court has delivered a judgment convicting the individual of unlawful conduct. Every person is presumed innocent until found guilty by a final judgment. Moreover, the presumption of innocence has additional functions of a specific criminal procedure nature. Consequently, guilt must be alleged and proven by a prosecutor. Where after examining the evidence adduced in hearings the court has doubts and the accused's guilt has not been indisputably proved, the Court must acquit the accused.

The prohibition against interferences with the sphere of an individual before the delivery of a judgment convicting the individual is not absolute. Just as the presumption of innocence does not prevent criminal proceedings from being instituted, it also does not prevent compulsory measures being taken before their completion, provided that the requisite conditions are fulfilled. The important functions of criminal law and criminal proceedings (e.g. ensuring evidence, the appearance in court of persons charged, the effectiveness of compulsory measures following conviction and protecting the human rights and fundamental freedoms of others) render various measures interfering with the human rights and fundamental freedoms of the accused necessary even before the delivery of a judgment and, exceptionally (directly or indirectly), also render measures interfering with the human rights and fundamental freedoms of third persons necessary. Regarding the basis on which a decision to order such measures is made, the rules of criminal procedure must lay down substantive conditions and procedures that strike a balance between, on the one hand, human rights and fundamental freedoms and, on the other hand, the above-mentioned functions of criminal procedure. A rule on a specific restrictive measure must definitively and in compliance with the Constitution regulate the substantive conditions and procedures for taking decisions on the ordering, duration and termination of such a measure. The Constitution does not directly regulate interim measures for securing a claim for the deprivation of a pecuniary advantage, and consequently, the Constitution does not directly regulate substantive conditions for ordering such measures. Nevertheless, this does not mean that the statutory regulation of such measures need not fulfil the important conditions set out in the Constitution in order to be constitutional. An interim measure for securing a claim for the deprivation of a pecuniary advantage is an interference with human rights and fundamental freedoms.

The rules of the Code of Criminal Procedure (hereinafter CCP) allowing for the above-mentioned interim measures are an interference with the right to private property set out in Article 33 of the Constitution. According to established Constitutional Court case-law, the first condition of the permissibility of an interference with human rights and fundamental freedoms is that the interference must be based on a legitimate, objectively justified goal. Moreover, a decision must always be made as to whether an interference is consistent with the principles of a State governed by the **rule of law** (Article 2 of the Constitution), and consequently, with the principle prohibiting excessive interferences by the State even in cases where a legitimate goal is pursued (the general principle of proportionality). An evaluation of whether there may be a case of excessive interference is carried out by the Constitutional Court on the basis of the test known as the strict test of proportionality.

The aforementioned test includes a review of three aspects of the interference:

- whether the interference is at all necessary (needed) for achieving the goal pursued;

- whether the interference in question is appropriate for achieving the goal pursued, *i.e.* that that goal can in fact be achieved by that interference; and

- whether the weight of the consequences of the interference with the human right is proportionate to the value of the goal pursued, i.e. to the resulting benefits (the principle of proportionality in a narrower sense or the principle of proportionality).

Only an interference that passes all three aspects of the test is constitutionally permissible.

In criminal procedural law, a restriction of human rights and fundamental freedoms by means of ordering measures before the delivery of a judgment is to be considered in light of the probability that a person whose

rights are to be restricted has committed a criminal offence. The balance of proportionality between the right interfered with and the goal pursed by the interference is to be assessed on the basis of a standard of evidence. This standard is as strict as the interference is burdensome and as high as the importance of the right interfered with. This is a fundamental condition for cases where the presumption of innocence is denied to such an extent so as to permit an interference with an individual's rights. The Code of Criminal Procedure is inconsistent with the Constitution, as it does not lay down the standard of evidence or the degree of probability that a criminal offence was committed by which a pecuniary advantage was unlawfully obtained as a substantive condition for ordering interim measures for securing a claim during the police investigation stage.

Aside from the standard of evidence, fundamental to a review of proportionality in the narrower sense within the scope of a review of the constitutionality of the substantive conditions of restrictive measures in criminal procedure are the conditions limiting the scope of the restrictive measures so that those measures do not become disproportionate. As an interim measure for securing a claim for the unlawful deprivation of a pecuniary advantage is a continuous restrictive measure, it is necessary for its duration to be definitively restricted at the statutory level. The Code of Criminal Procedure does not contain any explicit provisions doing so; consequently, it permits excessive interferences with the right to property set out in Article 33 of the Constitution. Any interim securing measure must correspond to the assessed value of the pecuniary advantage that has been allegedly obtained by the commission of the criminal offence. The objective scope of interim measures for securing such claims is adequately restricted in relation to the alleged pecuniary advantage obtained.

The petitioners failed to substantiate their allegation that the impugned provision of the Code of Criminal Procedure and the provisions restricting execution in the Execution of Judgments in Civil Matters and Securing of Claims Act allowed for a constitutionally impermissible threat to one's social security and dignity by allowing interim orders for securing a claim of a pecuniary advantage.

In case no. U-I-18/93 of 11.04.1996, *Special Bulletin Leading Cases 1* [SLO-1996-S-003], the Constitutional Court explained the procedural guarantees inherent in the fact that individual restrictive measures are imposed by a judicial decision. Those guarantees are: the right to judicial protection set out in Article 23 of the Constitution; the right to equal protection of rights set out in Article 22 of the Constitution; the legal guarantees which follow from Article 29 of the Constitution; the presumption of innocence set out in Article 27 of the Constitution; and the right to legal remedies set out in Article 25 of the Constitution.

The impugned provision of Article 502.1 CCP sets out, *inter alia,* that such interim securing measures are to be ordered by a court *ex officio*. The Code of Criminal Procedure is thereby inconsistent with the presumption of innocence or, more precisely, with its requirement that the burden of allegation and proof is borne by the prosecutor. Moreover, that provision is inconsistent with the requirement of an impartial judge laid down by Article 23.1 of the Constitution.

As the impugned regulation provides that such interim securing measures may be ordered *ex officio*, a motion brought by a prosecutor is not needed. Consequently, a person who is affected by the measures imposed does not have an opportunity to present arguments against such interim measures and adduce evidence to support his or her arguments. The legislature thereby interfered with the following rights of persons against whom the measures are ordered: the equal protection of rights (Article 22 of the Constitution); judicial protection (Article 23 of the Constitution); and the fundamental legal guarantees in criminal proceedings (Article 29 of the Constitution). The legislature must provide for a method that will adequately make up for the absence of adversarial proceedings prior to a decision being taken on interim securing measures.

In cases where a panel of judges at a hearing decides to order such interim securing measures, it is explicitly set out that no appeal or other legal remedy lies against such a decision. Moreover, the nature of the matter is such that an error in or the unlawfulness of such an order cannot be raised in an appeal against a judgment because at the end of the first-instance proceedings, the measures are either entirely withdrawn or replaced by an order compelling a person to surrender the unlawfully obtained pecuniary advantage. Consequently, it amounts to an interference with the individual's right to legal remedies, which is set out in Article 25 of the Constitution. The objective of this regulation is not clear from the regulation itself or from the nature of the

matter. As the Constitutional Court was not aware of the objective of the restriction, it could not establish the restriction's necessity, adequacy and proportionality in the narrower sense.

For reasons of organisation, a court decides on the measure to be ordered for interim security in each case; this situation is consistent with the requirements set out in Article 23.1 of the Constitution. Consequently, the provision in Article 109.2 CCP providing that judicial bodies have the competence to take such a decision is not inconsistent with the Constitution.

Moreover, the petitioners challenged the constitutionality of Article 506.a.1 CCP, which regulates the treatment of the property that is the subject of interim securing measures for a claim for the deprivation of an unlawfully obtained pecuniary advantage. In that respect, an especially speedy decision by a court is required. That requirement is in accordance with the provision of Article 23.1 of the Constitution on deciding without undue delay. Another requirement is that the standard of care in dealing with that property is the standard of care that would be taken by a good manager. That requirement introduces a civil standard of care, the purpose of which is to minimise the seriousness of the interference with the right to private property (Article 33 of the Constitution) so that the seriousness of the interference is not any greater than absolutely necessary. Consequently, the impugned provision is consistent with the principle of proportionality.

Languages:

Slovenian, English (translation by the Court).

South Africa

Constitutional Court

Important decisions

SLO-2004-1-001 26-02-2004 U-II-1/04

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26-02-2004 / **e)** U-II-1/04 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 25/04 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (English, Slovene).

Keywords of the Systematic Thesaurus:

1.3.4.6 **Constitutional Justice** - Jurisdiction - Types of litigation - Admissibility of referenda and other consultations.
1.6.3 **Constitutional Justice** - Effects - Effect *erga omnes*.
1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
2.3 **Sources of Constitutional Law** - Techniques of review.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.13 **General Principles** - Legality.
5.2.2.4 **Fundamental Rights** - Equality - Criteria of distinction - Citizenship or nationality.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.
5.3.38.1 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Criminal law.

Keywords of the alphabetical index:

Erased, residence, discrimination / Foreigner, permanent residence, loss / Referendum, preliminary, legislative / Citizen, former state.

Headnotes:

The interpretation of Item III of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (TUL) and Article 13 of Constitutional Act for the Implementation of the TUL (UZITUL), according to which the citizens of other Republics who were on the day of the plebiscite registered as permanent residents in the territory of the Republic of Slovenia and who failed to apply for citizenship before the expiry of the time limit under the Foreigners Act (Ztuj) but continued to actually reside in the Republic of Slovenia were not recognised as having any status and with the expiry of the time limit lost their status as permanent residents - for which they had to apply again as if they had just settled in the Republic of Slovenia, is legally incorrect and cannot be supported by any established method of interpretation known to the legal profession, and is clearly contrary to the principle of equality before the law (Article 14.2 of the Constitution).

In the regulation proposed in para. 1 of the referendum question, the part that defines the persons eligible for retroactively claiming permanent resident status as those persons who on 25 February 1992 were "transferred from the register of permanent residents to the register of foreigners having no permanent residence" is contrary to the principles of a State governed by the **rule of law** requiring legal norms to be clear, determined and unambiguous, and not to lend themselves to various interpretations.

The regulation proposed in para. 4 of the referendum question, allowing the Veterans of the War for Slovenia Association to make a proposal for the reopening of proceedings within a time limit of two years, is contrary to Article 2 of the Constitution, on the ground that it is inconsistent with the provisions of the Administrative Procedure Act establishing the reopening of proceedings as a "general" extraordinary legal remedy against final administrative decisions.

The provision in para. 5 of the referendum question, which excludes the possibility of issuing a permanent residence permit to persons who did not respond to the call of the Presidency of the Republic of Slovenia to leave the YPA and the bodies of Yugoslav federal authorities within a certain time limit, is clearly inconsistent with the Constitution, in particular, with the principle of trust in the law as one of the legal principles of a State governed by the **rule of law** determined in Article 2 of the Constitution, and that provision violates the right to equal treatment set out in Article 14.2 of the Constitution.

The exclusion of the possibility of claiming damages for the unlawful conduct of the State is contrary to Article 26 of the Constitution. The exclusion of any possibility of claiming the rights related to the retroactive recognition of the status of permanent resident is contrary to Article 15.4 of the Constitution, which guarantees the right to obtain redress for the consequences of violations of human rights and fundamental freedoms.

Where a referendum question refers to a future legislature's obligation to criminalise a certain activity, the guarantees provided by the principle of legality under Article 28.1 of the Constitution must be considered at the time of drafting the referendum question, and not only or just at the time of drawing up the criminal provision based on the results of the referendum.

Summary:

On 11 February 2004 the National Assembly sought a Constitutional Court decision on the constitutionality of the contents of a request for calling a preliminary legislative referendum on the Bill on the Permanent Residence of Foreigners having the Citizenship of Other State Successors to the Former Socialist Federal Republic of Yugoslavia (SFRY) in the Republic of Slovenia Registered as Permanent Residents in the Republic of Slovenia on 23 December 1990 and 25 February 1992. The initiative for voters to submit a request for calling a referendum came from the Slovenian Democratic Party (SDP) and New Slovenia (NSI). According to the National Assembly, the contents of the request for calling a referendum were contrary to the Constitution.

The National Assembly noted that the initiative for calling a preliminary legislative referendum related to the above-mentioned Bill, whose contents aimed at ensuring the implementation of Items 1-4 of the operative provisions of Constitutional Court Decision no. U-I-246/02 dated 3 April 2003, by which the Court had decided

to redress the injustices caused to the persons known as the "erased" inhabitants of Slovenia. Moreover, the National Assembly found that the contents of the referendum question actually exceeded the contents of that Bill and would consequently also have an impact on the implementation of the Act implementing Item 8 of the above-mentioned Constitutional Court decision, for which a subsequent legislative referendum had already been called. The National Assembly reasoned that the contents of the request for a preliminary legislative referendum on the Bill gave rise to a question on the admissibility of using a referendum to decide on the proposed (different) solutions in a case where the National Assembly is bound to enact a statute in conformity with Constitutional Court decisions, in the case under review, in conformity with Decision no. U-I-246/02. If the referendum were to result in vote for a proposed solution that did not follow the Constitutional Court decision, the National Assembly would be bound by two contradictory obligations - by the Constitutional Court decisions and the voters' will expressed at the referendum.

The Constitutional Court found the provisions contained in paras. 1 and 3 of the referendum question were based on the interpretation that from 25 February 1992 onwards, the citizens of other Republics should have brought their legal status into conformity with the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (TUL), the Constitutional Act for the Implementation of the TUL (UZITUL), the Foreigners Act (ZTuj) and other relevant regulations in the period after the Republic of Slovenia gained its independence.

The Constitutional Court held that that interpretation of Item III of the TUL and Article 13 of the UZITUL was contrary to the principle of equality before the law (Article 14.2 of the Constitution). Only an interpretation on the basis of which the citizens of other Republics would be granted permanent residence in the same way as it was granted to foreigners under Article 82.3 of the ZTuj would be in conformity with the principle of equality, which is found in Item III of the TUL.

The Constitutional Court held that the part of the regulation proposed in para.1 of the referendum that defined the persons eligible for retroactively claiming permanent resident status as those persons who on 25 February 1992 had been "transferred from the register of permanent residents to the register of foreigners having no permanent residence" was also contrary to the principles of a State governed by the rule of law requiring legal norms to be clear, determined and unambiguous, and not lend themselves to various interpretations. The regulation proposed in para. 1 of the referendum issue was inconsistent with Article 2 of the Constitution for the reason that if the definition of an eligible person under para. 1 of the referendum question were to be adopted in the referendum, it would mean that the legislature would have to enact a definition referring to a transfer to a non-existent register or a definition based on a legal situation that did not exist.

Para. 2 of the referendum question, which contains a provision that would bind the legislature to set a six-month time limit for submitting an application for the retroactive recognition of permanent resident status, was in itself not contrary to the Constitution, although the solution was less favourable than the one in the proposed statutory regulation.

In para. 5 of the referendum question, the proposition that would exclude the possibility of a permanent residence permit being acquired by a person who did not respond to the call of the Presidency of the Republic of Slovenia to leave the Yugoslav People's Army and the bodies of Yugoslav federal authorities within a certain time limit would be clearly inconsistent with the Constitution, in particular, with the principle of trust in the law as one of the legal principles of a State governed by the rule of law determined in Article 2 of the Constitution, and would violate the right to equal treatment determined in Article 14.2 of the Constitution. However, according to the Constitutional Court, the proposition in the same paragraph of the referendum question, which provides for denying the grant of a permanent residence permit to those persons who acted against the values that are in accordance with the provision in Article 4.1 of the UZITUL protected by the criminal legislation of the Republic of Slovenia, would not be inconsistent with the Constitution. The Constitutional Court based its reasoning on the interpretation of Article 4 of the UZITUL, in conjunction with Article 20 of the UZITUL. The Court also noted the rule that any such activity had to contain all the elements of the criminal offence to which the above-mentioned provision referred.

The regulation proposed in para. 6 attempted to exclude any possibility of compensation for the damage incurred by the citizens of other Republics arising from their inability to claim rights related to permanent

residence. The Constitutional Court held that the exclusion of the possibility of claiming damages for the unlawful conduct of the State was contrary to Article 26 of the Constitution, and that the exclusion of any possibility of claiming the rights related to the retroactive recognition of permanent resident status was contrary to Article 15.4 of the Constitution, which guarantees the right to obtain redress for the consequences of violations of human rights and fundamental freedoms.

In para. 7 of the referendum question, a regulation was proposed to criminalise the unlawful and unconstitutional delivery of decisions on permanent residence with retroactive effect. The Constitutional Court held that the proposed regulation, which amounted to a new criminal offence that interfered with an existing criminal offence, was contrary to Article 28.1 of the Constitution. Where a referendum question refers to a future legislature's obligation to criminalise a certain activity, the guarantees provided by the principle of legality under Article 28.1 of the Constitution must already be considered at the time of drafting the referendum question, and not only or just at the time of drawing up the criminal provision based on the results of the referendum.

Supplementary information:

Legal norms referred to:

- Articles 2, 14.2, 15, 26 and 28 of the Constitution (URS);

- Articles 16 of the Referendum and People's Initiative Act /ZRLI).

Languages:

Slovenian, English (translation by the Court).

SLO-1999-3-005 23-09-1999 U-I-163/99

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 23-09-1999 / **e)** U-I-163/99 / **f)** / **g)** *Uradni list RS* (Official Gazette), 59/99 and 80/99; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), VIII, 1999 / **h)** *Pravna Praksa*, Ljubljana, Slovenia (abstract); CODICES (English, Slovene).

Keywords of the Systematic Thesaurus:

1.1.4.2 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Legislative bodies.
1.3.4.5.4 **Constitutional Justice** - Jurisdiction - Types of litigation - Electoral disputes - Local elections.
1.6.1 **Constitutional Justice** - Effects - Scope.
1.6.2 **Constitutional Justice** - Effects - Determination of effects by the court.
1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
1.6.9.2 **Constitutional Justice** - Effects - Consequences for other cases - Decided cases.
3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.8.4.1 **Institutions** - Federalism, regionalism and local self-government - Basic principles - Autonomy.
4.8.6 **Institutions** - Federalism, regionalism and local self-government - Institutional aspects.
5.2.1.4 **Fundamental Rights** - Equality - Scope of application - Elections.
5.3.29.1 **Fundamental Rights** - Civil and political rights - Right to participate in public affairs - Right to participate in political activity.
5.3.41.1 **Fundamental Rights** - Civil and political rights - Electoral rights - Right to vote.

Keywords of the alphabetical index:

Municipality, establishment, criteria / Local self-government, right.

Headnotes:

A decision by the Constitutional Court is binding on the legislature, which means that the latter is obliged to implement the Court's decision; otherwise, the principles of a state governed by the **rule of law** and of the separation of powers would be breached. Where the Court makes an order on the basis of its authority under the Constitutional Court Act as to the manner of implementing its decision, the legislature may nevertheless change by statute the manner of implementing this decision. The adoption of such a statute is not unconstitutional in itself. Only the manner of implementation embodied in such a statute can be unconstitutional, and this is subject to constitutional review if this is requested of the Court.

The holding of elections to the bodies of a municipality whose territory has not yet been adjusted to meet the constitutional and statutory criteria does not violate the constitutional right to local self-government. Changes to the status of a local community should not be directly connected with elections. Local elections would be unconstitutional if they were carried out in a manner that made it impossible for qualified voters to exercise freely their will and their equality with respect to the exercise of their right to vote. Local elections are not, however, unconstitutional only because of the fact that during a certain period of time local community bodies have been elected on municipal territory that is not completely in conformity with constitutional provisions.

The constitutional right of voters to vote for representatives of local self-government at certain time intervals does not require that elections be carried out at precise four-year intervals. The legislature could also set a longer term of office for local self-government bodies. Nevertheless, due to the general constitutional principle of equality, the Court cannot extend the term of office of municipal bodies for an unlimited time. A longer postponement of local elections could seriously jeopardise citizens' exercise - by periodically choosing their representatives in local self-government bodies - of their right to local self-government. The periodic carrying out of elections must therefore be made possible, even if these are carried out in a municipality established in a manner that does not meet all constitutional criteria. The challenged Act, which was intended to establish the legal basis for calling local elections in Koper Urban Municipality, did not violate the principle of a State governed by the **rule of law**.

Summary:

The Constitutional Court ruled in Decision no. U-I-301/98 that Article 3.2 of the Establishment of Municipalities and of their Geographical Boundaries Act ("ZUODNO") was unconstitutional and set a one-year time-limit for the National Assembly to remedy this defect. Furthermore, on the basis of Article 40.2 of the Constitutional Court Act, Official Gazette RS, no. 15/94 ("ZustS"), the Court ordered the extension of the term of office of the Koper Urban Municipality bodies until the assumption of office of the new municipality bodies to be established in accordance with the Constitution. Following this decision the regular local elections in this municipality were not held. The National Assembly then legislated to make possible local elections even before the amendment of ZUODNO to comply with the Constitution. It was this Act that was subject to challenge before the Court. The petitioners alleged *inter alia* that the legislature, by modifying the Court's orders, had violated the principle of the separation of powers.

Article 3.3 of the Constitution defines the principle of the separation of powers as being Government divided into legislative, executive and judicial branches. The Constitutional Court has often defined the contents of this principle in its decisions (see cross-references). The Constitutional Court belongs to the judicial branch of power but has special powers compared with other courts (Articles 160 and 161 of the Constitution). It is the State body which reviews the constitutionality of the regulations of the legislative branch as well as the constitutionality and legality of the regulations of the executive branch. Thus, in the framework of its powers, in the most direct way possible, it enters into relations with these bodies. The legislature is bound by the interpretations of the Constitutional Court, under the principle of the separation of powers. Therefore, the legislature must implement Constitutional Court decisions; otherwise, it is in violation of Articles 2 and 3 of the Constitution (the principle of a state governed by the rule of law and the separation of powers).

Article 40.2 ZustS empowers the Constitutional Court to determine when necessary which body must

implement a decision and in what manner. On the basis of this provision the Court may temporarily regulate a transitional state of affairs until the legislature remedies the state of affairs to conform with the Court's decision. Article 40.2 ZUstS does not lay down the conditions which must be fulfilled for it to be applied, its application being left to a case-by-case judgment by the Court. The Court may decide on the manner in which its decision must be implemented irrespective of the proposals of the participants in the proceedings. What is most important is that by a decision reached on such a basis the Court does not necessarily interpret the Constitution and hence, in this part, does not explicitly exercise its power of constitutional review under Articles 160 and 161 of the Constitution. The legal character of a decision reached by the Constitutional Court pursuant to Article 40.2 ZUstS is thus different from the legal character of a decision relating to the constitutional review of regulations. Thus, the legislature may change by statute the manner of implementing a decision determined on the basis of Article 40.2 ZUstS. The adoption of such a statute is not in itself unconstitutional. Only the manner of implementation included in such a statute may be unconstitutional; this, however, is subject to constitutional review if it is requested of the Constitutional Court. Thus, the Court had to evaluate in this case whether the provisions of the challenged statute were in conformity with the Constitution.

The challenged statute would not comply with the Constitution if by it the National Assembly regulated a particular question in a manner conflicting with the constitutional interpretation given by the Court. The Court itself is also bound by the doctrine of precedent to decide substantially similar cases in a substantially similar way, unless changed circumstances and developments in legal theory require different reasoning. In such cases the Court should take these circumstances or arguments into account and if different reasoning is applied, leading to a different result, the reasons should be given in the decision.

The reasoning behind the Court's extension of the term of office of Koper Urban Municipality bodies is not developed at length in Decision no. U-I-301/98. In Decision no. U-I-183/94, however, the Court explicitly stated that the formation of municipalities is an on-going process that does not end with the establishment of the municipality but continues as the municipality develops into as natural and functional an entity as possible. The Court further reasoned that it is the particular duty of the legislature to determine within the framework of its powers and of the constitutional scheme relating to municipalities the statutory criteria to be applied in establishing municipalities. The Court limited itself in this decision to finding the Act in question (ZUODNO) to be unconstitutional, but decided not to annul the Act as this would have prevented the holding of elections to new bodies in the disputed territories. This would in turn have prevented the transformation of the old municipality system into the new system of local self-government across the entire territory of the country, a result which could not be tolerated, as postponing the formation of new municipalities would have created an even greater conflict with the Constitution than the immediate election of a new municipal council, "because even municipalities which do not entirely conform with the constitutional concept of local self-government do conform more than the old municipalities which originate from the system of considering municipalities to be communes".

The question of the constitutionality of these elections must be considered in the context existing at the time. The right to local self-government is the right of inhabitants who live in a certain area and who are connected with each other by common needs and interests to regulate local affairs by themselves. The right to local self-government is defined in the Constitution not as a fundamental human right but as a constitutional right based on Article 9 of the Constitution. Elections would be unconstitutional if they were held in such a manner that the free exercise of the will of persons entitled to vote and equality in exercising the right to vote were made impossible. However, they would not be unconstitutional only by reason of the fact that during a certain time period local community bodies are formed on the territory of a municipality that is not entirely in conformity with constitutional provisions. Thus the petitioners' assertions that the carrying out of elections to the bodies of a municipality which has not yet been adjusted to meet the constitutional and statutory criteria entails a violation of the right to local self-government are not well founded.

The Court ruled that the challenged Act did not violate the principle of the rule of law (Article 2 of the Constitution), nor was there a violation of Article 87 of the Constitution, which provides that the rights and obligations of persons are to be regulated only by statute. Accordingly, the challenged Act did not violate the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 2, 3.3, 9, 14, 87, 160, 161 of the Constitution;
- Article 14 of the Local Self-Government Act (ZLS);
- Articles 24, 26 of the Local Elections Act (ZLV);
- Articles 21, 40.2 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court judge.

Dissenting opinion of a Constitutional Court judge.

Cross-references:

On the principle of the separation of powers, see cases no. U-I-83/94, dated 14.07.1994, Official Gazette RS, no. 84/94 and DecCC III, 89, full text in English in CODICES [SLO-1994-X-048]; no. U-I-158/94, dated 09.03.1995, Official Gazette RS, no. 18/95 and DecCC IV, 20, *Bulletin* 1995/1 [SLO-1995-1-005]; no. U-I-224/96, dated 22.05.1997, Official Gazette RS, no. 36/97 and DecCC VI, 65.

The following cases were also referred to in this decision: Ruling no. U-190/95 and Decision no. U-I-114/98, dated 15.07.1999, Official Gazette RS, no. 61/99; Decisions no. U-I-301/98, dated 17.09.1998 (DecCC, 157); no. U-I-158/94, dated 09.03.1995 (DecCC IV, 20); no. U-I-114/95, dated 07.12.1995 (DecCC IV, 120); and no. U-I-183/94, dated 09.11.1994 (DecCC III, 122), full text in English in CODICES [SLO-1994-X-055].

Languages:

Slovene, English (translation by the Court).

SLO-1998-S-008 26-11-1998 U-I-31/96

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26-11-1998 / **e)** U-I-31/96 / **f)** / **g)** *Odlocbe in sklepi Ustavnega sodisca* (Official Digest), VII, 212 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
3.11 **General Principles** - Vested and/or acquired rights.
3.18 **General Principles** - General interest.
5.4.14 **Fundamental Rights** - Economic, social and cultural rights - Right to social security.
5.4.16 **Fundamental Rights** - Economic, social and cultural rights - Right to a pension.

Keywords of the alphabetical index:

Pension, adjustment.

Headnotes:

The Constitution does not prevent a statute from changing previous statutorily-determined rights by the introduction of provisions having prospective effect, if these changes are not contrary to certain rights determined by the Constitution, or other constitutional provisions. When looking at this issue, courts must also take into account the principle of maintaining confidence in the law as one of constitutional principles of a

state governed by the **rule of law**. The extent of rights determined by statute may be reduced by statute, of course, if this reduction has prospective effect and also if due account is taken (in the present case) of the right to social security laid down under Article 50 of the Constitution, and the principle of maintaining confidence in the law as one of the principles of a state governed by the **rule of law**.

Because of a decision of the founder of the public Institution for Pension and Disability Insurance to separate from the remainder of the institution an internal part of it, i.e. the capital fund, which after the separation operates as a joint independent stock company, a repeated nationalisation of property did not occur.

A sufficient majority of the General Assembly of the Institution for Pension and Disability Insurance, being the representatives of persons, stated that people who are entitled to enjoy the social rights given to them under the Insurance scheme, which is determined by statute, must accept that the scheme may be changed by statute, if reasons exist in favour of a prevailing and legitimate public interest over the interest in the protection of trust in the law.

Supplementary information:

Legal norms referred to:

- Articles 2, 14, 15, 50, 155 of the Constitution;

- Article 26.2 of the Constitutional Court Act (ZUstS).

Languages:

Slovene, English (translation by the Court).

SLO-1998-S-003 12-02-1998 U-I-283/94

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12-02-1998 / **e)** U-I-283/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), 20/98; *Odlocbe in sklepi Ustavnega sodisca* (Official Digest), VII, 26 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.9 **General Principles** - Rule of law.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.9.6 **Institutions** - Elections and instruments of direct democracy - Representation of minorities.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.2.1.4 **Fundamental Rights** - Equality - Scope of application - Elections.
5.2.2.3 **Fundamental Rights** - Equality - Criteria of distinction - National or ethnic origin.
5.3.45 **Fundamental Rights** - Civil and political rights - Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

National affiliation, declaration / National community, special rights / Parliament, national communities, representatives / Local government, national community, representation.

Headnotes:

It is not in conflict with the Constitution that members of the ethnic Italian and Hungarian national communities have a constitutionally guaranteed right that in elections of delegates to the National Assembly and at

elections of members to municipal councils they cast two votes - one for the election of the representative of the ethnic national community and the second for the election of other delegates or members of the municipal council. The Constitution guarantees members of these communities general and special voting rights.

It is in conflict with the constitutional provisions on a state governed by the **rule of law**, on the separation of powers, and on the legality of the workings of the administration and public authorities that certain measures are not determined by law. This means in particular those measures according to which the commissions of the self-governing national communities decide on the registration of electors in a special electoral roll of citizens who are members of the ethnic Italian and Hungarian national communities.

A citizen does not automatically have *locus standi* to impugn the standing orders or the statutory arrangement relating to the mandate of delegates to the National Assembly just because he has voting rights.

The provisions of a municipal statute, according to which the deputy mayor must be a member of the Italian national community if the mayor is Slovene, are not in conflict with constitutional provisions on equality before the law since the distinction among candidates is founded on the protection of the ethnic Italian or Hungarian national communities.

It is not in conflict with the Constitution and with the law if a municipal statute determines that the ethnic Italian national community is directly represented on the council of a local community.

It is not in conflict with the Constitution if a municipal statute gives local communities the status of legal persons.

Supplementary information:

Legal norms referred to:

- Articles 252, 338 of the 1974 Constitution;

- Articles 2, 5, 14, 16, 61, 64, 83, 120, 121 of the Constitution;

- Articles 10, 37 of the Elections to the Assembly Act;

- Point 3.2 of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);

- Articles 163, 250 of the Constitutional Amendments of 1989;

- Articles 21, 25, 48 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a constitutional judge.

Concurring opinion of a constitutional judge.

Languages:

Slovene, English (translation by the Court).

SLO-1998-3-010 30-09-1998 U-I-204/98

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30-09-1998 / **e)** U-I-204/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), 73/98; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), VII, 1998 / **h)** *Pravna Praksa*, Ljubljana, Slovenia (abstract); CODICES (English, Slovene).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
3.11 **General Principles** - Vested and/or acquired rights.
3.18 **General Principles** - General interest.
5.3.38 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law.
5.4.19 **Fundamental Rights** - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Constitutional Court, delayed abrogation / Health care, right resulting from mandatory health insurance / Insemination, artificial, costs / Bioethic.

Headnotes:

Since the challenged provision of the amendments to the Rules of Mandatory Health Insurance was to come into force later than the Rules themselves, the provision does not have retroactive effect and is not contrary to the constitutional provision on the prohibition of retroactive legislation (Article 155 of the Constitution).

The legislature did not have a reason based on a prevailing and legitimate public interest to include the number of attempts at artificial insemination made before the amended Rules came into force in the four attempts at artificial insemination permitted by the amendments. The provision of the Rules which restricts the previous unlimited number of attempts at artificial insemination covered by mandatory health insurance to four is therefore inconsistent with the principle of trust in the law as a constitutive part of the principle of a State governed by the **rule of law** (Article 2 of the Constitution), insofar as it also applies to the attempts at artificial insemination made before the amended Rules came into force.

Summary:

Article 155 of the Constitution states that statutes, other legal regulations and general acts cannot have retroactive effect. A regulation has retroactive effect when it determines any moment before it came into force to be the moment of the beginning of its application, and thereby applies to questions of legal positions or facts which had been resolved under the previous legal norm (Decision no. U-I-112/95 dated 8 May 1997 - OdlUS VI, 57). The challenged provision of Article 2 of the amended Rules does not have retroactive effect. According to Article 35, the amended Rules were to begin to apply on the fifteenth day following their promulgation in the Official Gazette; since they had been promulgated on 26 July 1996, they came into force on 10 August 1996 and began to be applied from 1 September 1996 on.

However, this does not mean that the Constitution does not protect the rights of citizens against statutory interventions having future effect. This protection is ensured by Article 2 of the Constitution, which provides that Slovenia is a State governed by the rule of law. The principles of a State governed by the rule of law include the principle of the protection of trust in the law. This ensures that the State will not arbitrarily worsen an individual's legal position, *i.e.* without a reason based on a prevailing and legitimate public interest. Not only vested rights, but also expectant rights are to a great extent protected by health insurance (OdlUS VI, 57). In weighing constitutional values, on the one hand it is important to know how significant the expectant right is to the person affected and what the significance of the changes is, and, on the other hand, whether the changes in a particular field of law were relatively predictable such that the persons affected could have predicted them (See Decision no. U-I-206/97 dated 17 June 1998, Official Gazette RS, no. 50/98).

The amended Rules restricted the previous unlimited number of attempts at artificial insemination covered by mandatory health insurance to four. By such a change the legislature interfered with a very delicate sphere of personal dignity. The amendments for the most part affected the legal position of the petitioner and other persons who had already undergone attempts at artificial insemination, or who had before the amendments

came into force taken advantage of all four attempts as later permitted by these amendments. Persons who had decided to undergo artificial insemination attempts before the amended Rules became effective could not have anticipated that the number of attempts permitted would subsequently be restricted. They had not decided to pay by themselves for artificial insemination attempts before the amendments came into force. From the responses of the Ministry of Health, the Health Insurance Institute (hereinafter: ZZZS), and from the petitioner's assertions, it follows that findings in the area of artificial insemination are developing, and, according to the amendment, attempts at artificial insemination made in the experimental phases of this development have been taken into consideration as such. The Health Insurance Institute also stated that before the amendments came into force, the main incentive for carrying out artificial insemination attempts had been the information and professional experience doctors wanted to obtain concerning these techniques. It is reasonable to assume that it was not only a desire to have children which was decisive in order to decide to carry out an artificial insemination attempt, but particularly the need to improve this medical procedure, which then could result in one or more attempts at artificial insemination, and it was not necessary to optimize the circumstances which might contribute to a higher probability of success of an attempt (the selection of a therapy and doctor, health conditions, etc.).

The legislature did not have a reason based on a prevailing and legitimate public interest to interfere with the legal position of the petitioner and other persons who had already undergone at least one attempt at artificial insemination before the amended Rules came into force. The Health Insurance Institute did not state in its reply the reasons for the disputed interpretation, but only the reasons for introducing the restriction that only four attempts at artificial insemination were permitted. Due to material, financial and personnel limitations only 2,000 attempts at artificial insemination can it is claimed be made per year, and because the number of persons who would like to undergo artificial insemination exceeds 2,000, the said restriction allegedly reinforced the equal position of all these persons.

Due to the fact that insufficiently grounded reasons were shown to interfere with the legal position of persons who had already undergone one or more attempts at artificial insemination, the provision of Article 2 of the amended Rules was abrogated in the challenged part. Such a decision means that in the four attempts at artificial insemination covered by mandatory health insurance, only the attempts made after the amendments came into force are included.

Supplementary information:

Legal norms referred to:

- Articles 2 and 155 of the Constitution;
- Articles 26 and 45 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court justice.

Cross-references:

In the reasoning of its decision the Constitutional Court refers to its Decisions no. U-I-112/95 dated 8 May 1997 (OdlUS VI,57) and no. U-I-206/97 dated 17 June 1998.

Languages:

Slovene, English (translation by the Court).

Slovene, English (translation by the Court).

SLO-1996-S-006 11-07-1996 U-I-98/95

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11-07-1996 / **e)** U-I-98/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), 44/96; *Odlocbe in sklepi Ustavnega sodisca* (Official Digest), V, 118 / **h)** *Pravna praksa, Ljubljana,*

Slovenia (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
4.8.3 **Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.8.8 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers.
4.8.8.5 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - International relations.

Keywords of the alphabetical index:

Planning, urban, power, transfer.

Headnotes:

Statutory provisions which in an unclear and equivocal manner regulate the taking over by the state of powers from local authorities are inconsistent with the principles of a state governed by the **rule of law**.

The transfer of administrative tasks, representing the execution of regulations within the competence of state organs, to administrative units is not inconsistent with Article 140.1 of the Constitution. However, what is inconsistent with this constitutional provision is the state's taking over of those administrative tasks which are regulated by local authorities.

The transfer of administrative tasks in the sphere of planning (issuing of planning permits) to state organs constitutes an interference with the constitutionally protected nucleus of local self-government, yet this interference is not constitutionally inadmissible for it is based on the protection of other constitutional values - principles of a state governed by the **rule of law** (legal certainty and legality).

Supplementary information:

Legal norms referred to:

- Articles 2, 9, 33, 69, 70, 120, 140, 141 of the Constitution;

- Article 5 of the Enabling Statute for the Implementation of the Constitution (UZIU);

- Article 70 of the Waters Act (ZV);

- Articles 4, 12, 15, 16, 17, 19, 21, 29, 67, 81, 95, 113, 117, 118, 129, 131 of the Agricultural Lands Act (ZKZ);

- Article 10 of the Matrimony and Family Relations Act (ZZZDR);

- Article 67 of the Urban Planning Act (ZUN);

- Articles 57, 101 of the Administration Act (ZUpr);

- Articles 8, 9, 33, 55, 60, 64, 69, 75, 85, 86, 90, 94, 109 of the Road Traffic Safety Act (ZVCP);

- Article 35 of the Construction of Buildings Act (ZGO);

- Article 17 of the Expropriation and Coercive Transformation of Real Estate into Social Property Act (ZRPPN);

- Articles 18, 19, 21, 26, 28, 29, 37, 38, 45, 47, 50 of the Natural and Cultural Heritage Act (ZNKD);

- Articles 21, 30, 43, 48 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a Constitutional Court judge.

Concurring opinion of a Constitutional Court judge.

Languages:

Slovene, English (translation by the Court).

SLO-1996-S-005 15-05-1996 U-I-271/95

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15-05-1996 / **e)** U-I-271/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), 27/96; *Odlocbe in sklepi Ustavnega sodisca* (Official Digest), V, 82 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

2.3.7 **Sources of Constitutional Law** - Techniques of review - Literal interpretation.
2.3.9 **Sources of Constitutional Law** - Techniques of review - Teleological interpretation.
3.3 **General Principles** - Democracy.
3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.13 **General Principles** - Legality.
3.16 **General Principles** - Proportionality.
4.10.6 **Institutions** - Public finances - Auditing bodies.
4.10.8.1 **Institutions** - Public finances - State assets - Privatisation.
4.13 **Institutions** - Independent administrative authorities.
5.4.4 **Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

Temporary injunction / Constitutional Court, decision, execution, method / Bank, payment on behalf of legal entity / Court of Audit.

Headnotes:

The provisions of the Agency of the Republic of Slovenia for Payments, Supervision and Information (Amendments and Supplements) Act (ZAPPNI-A) are not inconsistent with the Constitution. The Act establishes an agency for the purpose of auditing the process of privatisation as an autonomous and independent entity under public law with a position as such an auditing body should have in accordance with the decision of the Constitutional Court U-I-158/94 of 9 March 1995.

The provisions of the ZAPPNI-A which ensure for employees of APPNI employment and the continued discharge of the same tasks in the state body in the field of activities into the competence of which the discharge of such tasks has been transferred do not interfere with the employees' right to freedom of work and free choice of employment granted under Article 49 of the Constitution.

The provisions of the ZAPPNI-A, which state that the Auditing Agency shall have its Council as a special management body but will in other respects be autonomous and independent, are not in conflict with the principles of a state governed by the **rule of law** (Article 2 of the Constitution). The disputed provisions

concerning the Council do not make such control and influence of the legislative or executive branch over the Auditing Agency possible, as this would not be admissible under the Constitution.

The principles of a state governed by the **rule of law** demand that the powers of a state body be clearly defined and that proportionality between the adopted statutory solutions and the intent of the law be taken into consideration. A statute is in conformity with the Constitution when it is possible to determine the subject matter of such a statute on the basis of linguistic interpretation and teleological construction, so that the conduct of the bodies - whose obligation it is to implement the statute - is in this way determined. The modification of the provision relating to the powers of the APPNI is in conformity with these principles where - while ensuring control over the disposal of state-owned property - it allows the interpretation according to which the control of all legal entities incorporating state-owned capital falls within the competence of the Auditing Agency, and not just the control of those subject to the privatisation process in accordance with the ZLPP.

The provision of the ZAPPNI-A that allows banks (under conditions equal to those applicable to all other banking operations, and under conditions equal to those applicable to the APPNI) to perform payment operations on behalf of legal entities within the country, is not contrary to the principles of a state governed by the **rule of law** (Article 2 of the Constitution) and the principle of separation of powers (Article 3 of the Constitution).

It is not contrary to Article 153 of the Constitution that a provision of the ZAPPNI-A empowers the Bank of Slovenia and the Minister of Finance, each within their own field of competencies as defined by statutes, to determine the sequence and method of transfer of the tasks relating to the payment operations between legal entities within the country to banks, and concerning the issuance of licences for banks to carry out such operations. However, it will only be possible to review the conformity of their general and individual acts with the Constitution and statutes when such acts are issued.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 49, 150, 151 of the Constitution;

- Articles 2, 15 of the Banks and Savings Banks Act (ZBH);

- Articles 22, 23 of the Foreign Exchange Transactions Act (ZDP);

- Article 9 of the Administration Act (ZUpr);

- Article 5 of the Organisation and Field of Activities of the Ministries Act (ZODPM);

- Article 20 of the Companies Ownership Transformation Act (ZLPP);

- Articles 55, 56 of the Employees in State Bodies Act (ZDDO);

- Article 5 of the Court of Auditors Act (ZRacS);

- Articles 29, 30, 31, 32, 33, 34, 35, 36.i, 100 of the Labour Relations Act (ZDR);

- Articles 21, 40.2 of the Constitutional Court Act (ZUstS).

Concurring opinion of a judge of the Constitutional Court.

Dissenting opinion of a judge of the Constitutional Court.

Languages:

Slovene, English (translation by the Court).

SLO-1995-S-002 25-05-1995 U-I-320/94

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25-05-1995 / **e)** U-I-320/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), 37/95; *Odlocbe in sklepi Ustavnega sodisca* (Official Digest), IV, 49 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.13 **General Principles** - Legality.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Monument, cultural, privatisation / Natural site, privatisation / Decree, *ultra vires*.

Headnotes:

Certain decrees, which provide for the mandatory exclusion of cultural monuments and natural sites from the lists of company property falling within the scope of privatisation programmes, are null and void *ab initio*, as they were not in conformity with the statutory provisions under which they were issued *(ultra vires)* and were in breach of the principle of the **rule of law**.

Supplementary information:

Legal norms referred to:

- Articles 2, 120, 153.3 of the Constitution;

- Article 51 of the Natural and Cultural Heritage Act;

- Article 2 of the Companies Ownership Transformation Act;

- Articles 26, 45 of the Constitutional Court Act.

Languages:

Slovene, English (translation by the Court).

SLO-1995-1-006 30-03-1995 U-I-285/94

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30-03-1995 / **e)** U-I-285/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), 20/95; *Odlocbe in sklepi ustavnega sodisca* (Official Digest of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.11 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Charter of Local Self-Government of 1985.

3.4	**General Principles** - Separation of powers.
3.10	**General Principles** - Certainty of the law.
4.8.3	**Institutions** - Federalism, regionalism and local self-government - Municipalities.
4.8.4	**Institutions** - Federalism, regionalism and local self-government - Basic principles.
4.8.4.1	**Institutions** - Federalism, regionalism and local self-government - Basic principles - Autonomy.

Headnotes:

The transfer of all the powers of the former municipalities to the State by a general legal provision is incompatible with the **rule of law** and the separation of powers, which require a normative arrangement of powers in one or several laws because provisions on powers include powers to take decisions on individual administrative matters.

The legal provision whereby the competences of the former municipalities - including their original powers - were transferred to the State was found to be unconstitutional on the grounds that the concept of «matters within State competency» was not defined by any regulation.

Summary:

The principle of local government is included among the basic constitutional provisions and analysed in detail in a special chapter on local and other self government. The basic constitutional guarantee on local government («The autonomy of local government shall be guaranteed in Slovenia», Article 9 of the Constitution) is the institutionalised framework for decision-making on local public matters and also a reflection of the basic constitutional right of each person to participate in the administration of public affairs (Article 44 of the Constitution). Similarly, the European Charter on Local Government, in the preamble, directly juxtaposes the following three provisions:

- that local authorities are one of the main foundations of every democratic government,
- that the citizens' right to participate in public matters is one of the democratic principles common to all member States of the Council of Europe, and
- that this right can be most directly exercised at the local level.

Based on these key principles Article 3 of the European Charter on Local Government, develops a definition of local government as «the right and the ability of the local authority to regulate within the limits of the law and to carry out an essential part of public affairs within its own jurisdiction and for the benefit of the local population».

The takeover by the State of administrative tasks that are connected with the execution of local government or local public matters, and which the municipalities perform as an authority, would be contrary to Article 140 of the Constitution. In relations between the State and its inhabitants, the municipality is the local authority. This is also indirectly confirmed by the three provisions of the European Charter on Local Government referred to. The first refers to local authorities as one of the main foundations of any democratic government, the second and the third to the democratic principle of citizens' participation in the administration of public matters, both at the central and the local level, the difference being that at the local level it is done «more directly».

The Constitutional Court has clearly stated that in the transition to a system of local government, the National Assembly must separate and define the powers of the State and of the local communities (Decision no. U-I-13/94 of 20.01.1994).

However, this was not done by the National Assembly. Instead of a clear division of powers and a definition of the functions to be taken over by the State, it passed the impugned provision (Article 101.1 of the Law on

Administration, Official Gazette of the Republic of Slovenia, no. 67/94) with its unclear content, which according to the explanation of the National Assembly means that with this provision all State functions in the field of administration previously performed by the municipalities are to be transferred to the State administrative bodies. Its decision originated in the presumption that the mere fact that the powers of the old municipalities were prescribed by law means that they are State and not local matters. In so doing, the National Assembly interfered with the powers of the municipalities in a manner inconsistent with Article 140 of the Constitution.

Supplementary information:

The decision was taken by the Court with 1 dissenting and 1 concurring opinion.

In the reasons explaining the Resolution the Constitutional Court refers to Decree U-I-13/94 of 20 January 1994.

For reasons of joint deliberation and adjudication, this case was joined with case U-I-297/94 (resolution of 1 December 1994).

Languages:

Slovene, English (translation by the Court).

SLO-1995-1-005 09-03-1995 U-I-158/94

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09-03-1995 / **e)** U-I-158/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), 18/95; *Odlocbe in sklepi ustavnega sodisca* (Official Digest of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
4.6.2 **Institutions** - Executive bodies - Powers.
4.10.1 **Institutions** - Public finances - Principles.
4.10.6 **Institutions** - Public finances - Auditing bodies.
4.13 **Institutions** - Independent administrative authorities.

Keywords of the alphabetical index:

Decision, interpretative / Property, socially owned.

Headnotes:

The organisation of the Agency for Payment Operations as a public institution, the specific forms of subordinating the Agency to the Government and the management and control of its activities through its board, which have all been provided for as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duties under the Constitution and its statute are to control and audit the manner of disposing of socially-owned property in the process of ownership transformation.

In a State governed by the **rule of law**, statutory provisions must be drafted in such a way as to make possible their effective implementation.

Summary:

The essence of the constitutional provision dealing with the separation of powers lies not in the manner of organising the relationships between individual branches of government or government organisations, but in its fundamental function of protecting individual freedom and dignity in relations with the government. Democratic efficiency of separation of powers depends primarily on the quality of mutual controls and restrictions, as well as on co- operation in the collective, balanced and efficient attainment of national objectives. This is why it is possible to have, and why indeed there are, various organisational forms of implementation of the principle of horizontal, vertical and functional separation of powers in accordance with specific historical and cultural circumstances of the constitutional system actually in force.

Modern constitutional systems also incorporate bodies and organisations which, due to their organisational characteristics and formal powers, cannot be ranged among any of the three branches of government. Such constitutional institutions include for example: the central bank («monetary authorities»), the ombudsman, and the Court of Auditors.

In constitutional systems, where they exist, all these bodies and organisations are indisputably highly autonomous in relation to each branch of government. Their autonomy on the one hand, and their responsibility on the other are ensured by specific institutional requirements governing their independence, such as the professional and technical responsibility of holders of relevant public powers, procedural working rules prescribed by statute, a system of legal remedies against illegal acts, responsibility within the organisation, stability and transparency of the mandate of holders of responsible positions, a system of financing, etc.

The mere fact that in the former system the Public Audit Service was autonomous and that its independent status was provided for in the Constitution would be a sufficient reason for this status to be maintained while still dealing with socially-owned property. This is even more so because it is obvious that in the field of control over government expenditure in the new constitutional system, the Public Audit Service has been replaced by the Court of Auditors, which has also been granted an independent status by the Constitution. Nor is the Court of Auditors part of either judicial or of executive authorities, but is an institution *sui generis*, whose function of controlling government expenditure makes it essential for it to be able to control financial aspects of all three branches of the State.

On the basis of the foregoing it was the duty of the National Assembly to provide the Agency for Payment Operations, Control and Information with an autonomous status and to make it bound by the Constitution. This is why the organising of this service as a «public institution», the specific forms of subordinating the Agency to the Government and the management and control of activities of the Agency through its board, which have been provided for as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duties under the Constitution and statute are to control and audit the manner of disposing of socially-owned property in the processes of ownership transformation.

Supplementary information:

The decision was taken by the Court with 2 dissenting opinions.

For reasons of joint consideration and adjudication, this case was joined with case U-I-162/94 (resolution of 13 September 1994).

Languages:

Slovene, English (translation by the Court).

SLO-1995-1-002 19-01-1995 U-I-147/93

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19-01-1995 / **e)** U-I-147/93 / **f)** / **g)** *Uradni list RS* (Official Gazette), 18/95; *Odlocbe in sklepi ustavnega sodisca* (Official Digest of RS), IV 1995 / **h)** *Pravna praksa*

(Legal Practice Journal), Ljubljana, Slovenia (abstract); CODICES (English).

Keywords of the Systematic Thesaurus:

3.13 **General Principles** - Legality.
3.16 **General Principles** - Proportionality.
3.18 **General Principles** - General interest.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Denationalisation / Company, regulation, public interest.

Headnotes:

The legislator determines the rights of legal subjects by abstract and general legal norms. The exercise of these rights and their limits are dependent on the social intention of the legal norm. Since the rights of legal subjects are conditioned by the economic and political interests of society, the form of protection of rights varies.

The legislator sets time limits for the exercise of these rights and for the performance of acts in procedures for asserting these rights. The legislator thus guarantees legal protection as an essential element of a State based on the **Rule of Law**. With the expiry of the time limit, the right of a legal subject, which is a specific right on the basis of abstract and general norms, is either extinguished or its validity becomes obsolete.

The legislator may also lay down time limits in procedures for validating abstractly defined rights. Rules on time limits are generally of a mandatory character and are not subject to agreement by the parties in proceedings.

Summary:

The law on the transformation of ownership of companies (Official Gazette of the Republic of Slovenia, nos. 55/92, 7/93 and 31/93) regulates the transformation of companies with socially owned capital into companies with known owners. Its social aim is that the process of transformation starts and is completed as quickly as possible. In order to protect the rights of denationalisation claimants in these processes, and to enable at the same time the implementation of the law, it required that claims for the return of assets of companies which are being privatised be protected on application by the claimant. The consequence of a claim remaining unprotected is the loss of rights to companies. However, the right to validation of denationalisation claims does not as such cease but is converted into a right to compensation which is assessed in accordance with the Law on denationalisation and the regulations to which this law refers.

The Constitutional Court further finds that, with the impugned provisions of the Law on the ownership transformation of companies, the legislator seeks to facilitate the process of ownership transformation of companies. Without the regulation of questions expressly related to denationalisation, claimant companies would be entirely unable to start the procedure of ownership transformation and, in view of the legal time limit set for the transformation, would not be privatised at all.

Therefore, the Constitutional Court finds that the impugned regulation pursues the aims of the law on the ownership transformation of companies, which are in accordance with social needs and interests. Restricting the rights of denationalisation claimants by imposing strict time limits is a measure which is necessary in order to ensure the undisturbed and timely flow of privatisation. The measure only requires specific action by the party to the proceedings, and is proportional to the aims it pursues and necessary for the undelayed and undisturbed transition from the system of economic subjects with social capital to a system of subjects with

known owners.

Supplementary information:

The decision was taken by the Court with 1 concurring opinion.

By resolution taken by the Court of 14 July 1994, the case in question was joined to case number U-I-149/93 for common treatment and judgment.

Languages:

Slovene, English (translation by the Court).

SLO-1994-3-020 09-11-1994 U-I-172/94

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09-11-1994 / **e)** U-I-172/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), 73/94; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), III, 1994, 573 / **h)** *East European Case Reporter of Constitutional Law*, 1995, vol. 2, no. 2, 273; CODICES (English).

Keywords of the Systematic Thesaurus:

2.3.7 **Sources of Constitutional Law** - Techniques of review - Literal interpretation.
2.3.9 **Sources of Constitutional Law** - Techniques of review - Teleological interpretation.
3.3 **General Principles** - Democracy.
3.9 **General Principles** - Rule of law.
3.22 **General Principles** - Prohibition of arbitrariness.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.
5.3.23 **Fundamental Rights** - Civil and political rights - Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, Radio and Television Company.

Headnotes:

A provision which, in addition to the method of appointment and removal from office of the director of a public institution, introduces an indefinite and legally undefined concept of approval of appointment, is not in conformity with the principle of a State governed by the **rule of law**.

Such regulation does not allow for the legality of the relevant procedure and circumstances to be examined, nor for the application of substantive law. It allows for arbitrary decisions, and does not provide the injured party with minimum procedural rights.

Such regulation also fails to provide the director-general of Radio and Television with the necessary autonomy and independence *vis-à-vis* the holders of social and political power such as to protect against interferences with the constitutional right to freedom of the press.

Summary:

The principle of a State governed by the rule of law demands that statutory solutions be general and abstract. In connection with statutory provisions which refer, due to the nature of the matter which they regulate, to a preselected circle of persons, or to a single person even, it is all the more important that their effect on the

position of such persons be limited and, consequently, measurable and foreseeable. The aim of a statutory provision must be clearly evident, and the measures should be specified in detail. The legislator must adopt clear standards and prescribe their content: it is inadmissible for the legislator to leave the definition of the content of a standard to another body. Standards should be foreseeable and should allow for their testing. When a standard is not clearly defined, this makes possible the different application of the law and leads to arbitrariness on the part of State authorities. A statute is in conformity with the Constitution when grammatical and teleological interpretations yield the content of the legislative measure, and in this way the conduct of the bodies responsible for its enforcement is determined.

The Constitutional Court recalled the duty of authorities of all branches in a democratic State, and in particular to the duty of the legislator in the process of the development of a democratic State, to especially ensure freedom of the press and the freedoms of each individual journalist. For this purpose it is necessary to ensure freedom of expression of individual persons, as well as the protection of freedom of the press as an institution. The responsibility of the State in ensuring and developing freedom of the press, including radio and television, is especially important at a time when democratic institutions in the new Slovenian State are being rebuilt, in the face of numerous inherited and strong elements of a non-democratic political culture which formed the constitutional and factual basis for the single-party authorities in former Yugoslavia. This is why feelings of anxiety and fear may still exist with regard to the authorities and may in the case of journalists find their expression in (self-)censorship, and in the case of the public in political apathy and alienation.

Section 21 of the Radio and Television Slovenia Act prescribes the duties of the director-general of RTV Slovenia. Among other things, he shall organise and direct the activities and business operations of RTV, appoint heads of organisational units, coordinate the work of programme managers and heads of organisational units and decide any disputes between them, and shall also perform such other tasks as may be prescribed by statute. The director of RTV must also give a prior opinion on proposals for the appointment of directors of radio and television programmes and programmes for minorities. The realisation of statutory principles, on which the activities of public media are based, and, consequently, the respect for the fundamental constitutional right to freedom of the press, are therefore dependant in part upon his work. It is for this reason impossible to conceive of freedom of the press and of the freedoms of journalists in RTV without the existence of a degree of relative autonomy and professional independence in the director of RTV *vis-à- vis* the holders of social, economic and political power and to those who at any particular time are represented in the Council governing the administrative body. This required independence is of course legitimately limited by the manner of election of the director of RTV and by his public responsibility to exercise his functions in the public interest. But his autonomy and independence must be transparent and foreseeable. Such requirements are not fulfilled if the position of the director depends on the composition of the administrative body at any particular time, the distribution of political power in the State at any particular time, or on formal changes which the latter may adopt at any time concerning the status of the institution.

Languages:

Slovene, English (translation by the Court).

SLO-1994-3-019 03-11-1994 U-I-57/92

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 03-11-1994 / **e)** U-I-57/92 / **f)** / **g)** Official Gazette of the Republic of Slovenia, 76/94; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), III, 1994, 519 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.21 **General Principles** - Equality.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Farm, private, protected / Status, legal, inequality.

Headnotes:

It is not contrary to the Constitution for special rules concerning the inheritance of farmland and private farms to be prescribed by statute, because the commitment of Slovenia to the social State is observed, and in addition, special social and economic functions of medium- sized farms are defined.

The restricting of the freedom of the testator and the right to inherit farmland by statute does not infringe the principle of equality before the law, because the differentiation is introduced by statute on the basis of generally acknowledged factual circumstances. The restricting of disposal by bequeathal, of the right to inherit and of the right to property is contrary to the principles of a State governed by the **rule of law** if relevant measures and criteria are not prescribed explicitly, or at least in an ascertainable manner, by statute.

Summary:

It is contrary to the Constitution to restrict inheritance in too broad a manner, for the Act on Inheritance of Farmland and Private Farms among other things provides in Section 1 that the purpose of passing the law has to restrict the passing of farmland to the possession of those who will not cultivate the land. Such restrictions on property rights exceed the scope defined by Article 67.2 of the Constitution, according to which the manner in which property may be inherited, as well as the conditions under which it may be inherited, shall be determined by statute. For by such regulation the possibility for a particular category of citizens to inherit farmland or a farm under equal conditions is completely denied to such citizens. The said restriction fails to contribute to such exploitation of property as is provided for by the Constitution. Land maximums have been abolished. Now, the essential aim of the Act is to define farms under protection. At the same time, the heir to a medium-sized farm is protected by having his livelihood ensured and by not allowing the land to be broken into pieces (social function of the farm). Such protection is not needed in the case of big farms (large estates), which is why the National Assembly will have to redefine the upper and lower limits applying to a farm under protection. As the law is constructed so that its restricting aim is interspersed among a number of provisions, and since such provisions could not be severed so as to retain the applicability of the law, the Act had to be abrogated as a whole.

The Constitution provides in Article 67.2 of the Constitution that the manner in which property may be inherited, as well as the conditions under which it may be inherited, shall be determined by statute, while the basic criteria are specified in Article 67.1 of the Constitution and enjoin the legislator to regulate the manner in which property is acquired and enjoyed so as to ensure the economic, social and environmental functions of such property. In the Act under consideration, the economic and social functions are in the foreground, and this also connects with the provision of Article 2 of the Constitution in which Slovenia is defined as a social State. The Act on Inheritance of Farmland and Private Farms stresses the social function of property, which means that the latter represents an essential means of livelihood for some categories of persons. Such a livelihood is safeguarded by the prohibition of the division of land and by the proportionate relief offered to the person who will take over the farm with respect to birthright portions of other heirs. In line with this, the right to bequeath is in such cases restricted. Such differentiation and stressing of the social function of property is justified, because property rights and disposal by bequeathal are exercised in accordance with the nature and purpose of the matter, and in line with the general interest as defined in the agricultural policy of the State. A special legal regime applying to medium-sized farms results also from historical developments. Protection of medium-sized farms was stressed, because the problems relating to the social function of property did not come into question as far as large estates were concerned. A review of comparative law shows that protection of medium-sized farms is subject to special regulation in modern States.

Such regulation does not violate the constitutional principle of equality before the law (Article 14 of the Constitution). This principle prohibits the introduction, direct or indirect, of unjustified differentiation between legal and/or natural persons independently of the nature of the matter and the definition of the persons involved. The principle of equality implies that a law must be permeated by the principle of reasonableness

and by the aim of the law (*rationabilitas* and *causa legis*). Extreme understanding of equality, without taking into consideration the specific attributes or circumstances which are in issue, may lead to inequality. The Constitution itself has introduced inequality of legal status on the bases of social, economic and environmental functions of property (Article 67 of the Constitution), with respect to natural resources and national assets (Article 70 of the Constitution), with respect to the protection of land (Article 71 of the Constitution) and with respect to the protection of the natural and cultural heritage (Article 73 of the Constitution). In this way, the relativity of rights has been recognised with regard to the nature and purpose of the matter being regulated, or with respect to the specific position of persons who claim certain rights. In this connection, the legislator is not entirely free and may differentiate only for justified reasons, based upon differences of legal status and/or of experience from daily life. In the instant case, the legislation is justified because the threat to the livelihood of the heir who will take over the farm is reduced, and also because the economic function of property is stressed in that medium-sized farms are not allowed to be divided in a manner which would make their efficient operation impossible.

Supplementary information:

For reasons of joint consideration and adjudication, the Constitutional Court decided with its resolutions of 9 June 1994, 31 March 1994 and 30 June 1994 to attach to the case under consideration cases U-I-74/94, U-I-43/94 and U-I- 79/94.

Languages:

Slovene, English (translation by the Court).

SLO-1994-3-018 13-10-1994 U-I-17/94

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 13-10-1994 / **e)** U-I-17/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, 74/94; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), III, 1994, 507 / **h)** *East European Case Reporter of Constitutional Law*, 1995, vol. 2, no. 2, 265; CODICES (English).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.10 **General Principles** - Certainty of the law.
5.4.3 **Fundamental Rights** - Economic, social and cultural rights - Right to work.

Keywords of the alphabetical index:

Contract, employment, termination / Company, reorganisation / Bankruptcy / Redundancy.

Headnotes:

If the legislator has proclaimed by a statute that he will regulate a particular matter by a special law, but has failed to do so, then the said statute, or particular provisions thereof whose subject matter should be complemented by the special law, are not in conformity with the principle of legal certainty, one of the principles of a State governed by the **rule of law**.

Summary:

The Constitutional Court considered that the disputed provision was in conflict with the Constitution, because the Act on Composition, Bankruptcy and Liquidation had failed to regulate the rights of the employees whose employment is terminated in a specific way in the context of financial reorganisation procedures due to company insolvency.

The implementation of the disputed provision is subject to the provision of a mechanism for the protection of the position of employees under labour legislation, and to the protection of the social conditions of persons made redundant in the process of financial reorganisation.

The legal position of employees whose employment relation has been terminated as a legal consequence of the institution of bankruptcy proceedings cannot be equated with the legal position of so-called redundant individual employees and workers whose employment relation is terminated and who are a financial burden to the insolvent company. The provision of Section 51 of the said Act defines such workers and employees as permanently redundant labour, and even refers in such definition to relevant provisions of labour legislation. At the same time, it denies them the rights arising from their being permanently redundant labour and provides that a special statute shall be passed with a view to regulating their legal status.

In the Act under consideration, then, the legislator has undertaken the obligation of passing a statute. This promise, however, has not been fulfilled, with the result that a legal vacuum has been created in respect of the rights of certain categories of employee, contrary to the principle of legal certainty.

Languages:

Slovene, English (translation by the Court).

SLO-1994-3-017 06-10-1994 U-I-202/93

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 06-10-1994 / **e)** U-I-202/93 / **f)** / **g)** Official Gazette of the Republic of Slovenia, 74/94; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), III, 1994, 470 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.9 **General Principles** - Rule of law.
3.21 **General Principles** - Equality.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.4.6 **Fundamental Rights** - Economic, social and cultural rights - Commercial and industrial freedom.
5.4.8 **Fundamental Rights** - Economic, social and cultural rights - Freedom of contract.

Keywords of the alphabetical index:

Contractual freedom, restriction / Interest, contractual / Credit institution.

Headnotes:

Provisions regulating the maximum upper limit of contractual interests differently for individuals than for other persons are not in conflict with the Constitution. The restricting of contractual intent in this field is justified in a State governed by **rule of law** and a social State, the difference of treatment being based on a difference in actual status as represented by the different position of these persons in the market.

Summary:

The admissibility of imposing restrictions on contractual autonomy in the field of interest rates is justified by public interest, by the need to ensure social security, to ensure social and economic functions of property, and to provide for the principle of Slovenia being a State governed by the rule of law and a social State. Having regard to these considerations, the legislator could impose different restrictions on these freedoms to take account of different statuses and legal characteristics of individual participants in legal transactions. The peculiarities in the statuses and legal characteristics of natural and legal persons thus justify different legal

regulation of the limits of contractual autonomy of legal and natural persons.

The Constitutional Court established that in the field of credit institutions, there existed a practice which was not in conformity with the principle of Slovenia as a State governed by the rule of law and a social State. Crediting and granting of loans is engaged in both by natural and legal persons, irrespective of their registration. They make agreements concerning interest rates and other credit conditions without any restrictions and control. It would be constitutionally admissible for the legislator to interfere with this field by prescribing in more detail which persons may act as credit institutions and what conditions they have to fulfil in this respect. Furthermore, it is only for the legislator to judge whether the situation in this domain requires that the contractual intent of other persons should additionally be restricted by other instruments, not only by general provisions of civil law. Also, only the legislator can judge whether it is justified that, in conditions of a fairly stable domestic currency, our civil law should no longer include a restriction whereby contractual interest would cease accruing when its sum has reached the principal amount.

Supplementary information:

For reasons of joint consideration and adjudication, the Constitutional Court decided with its resolution of 9 June 1994 to attach to the case under consideration case U-I-15/94.

Languages:

Slovene, English (translation by the Court).

ESP-1996-1-010 28-03-1996 55/1996

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 28-03-1996 / **e)** 55/1996 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 102, 27.04.1996, 48-59 / **h)** .

Keywords of the Systematic Thesaurus:

3.16 **General Principles** - Proportionality.
3.19 **General Principles** - Margin of appreciation.
5.3.5 **Fundamental Rights** - Civil and political rights - Individual liberty.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.
5.3.26 **Fundamental Rights** - Civil and political rights - National service.

Keywords of the alphabetical index:

Sentence, proportionality / Reintegration, social.

Headnotes:

Under the Spanish Constitution, prevention is not the sole purpose of sentences. The constitutional provision establishing that the purpose of imprisonment and security measures has to be rehabilitation and social reintegration (Article 25.2 of the Constitution) does not settle the question of whether the possible objectives of sentences can be adjusted, to a greater or lesser extent, to take account of the Spanish Constitution's value system and, still less, whether, in this value system, criminal law assigns a specific purpose to sentences.

The right to freedom of ideology (Article 16 of the Constitution) cannot be used to gain exemption from the community service offered as an alternative to military service, for two reasons: first, this would have the result of rendering statutory authority meaningless and, second, this fundamental right is not in itself sufficient to free persons from their statutory obligations on grounds of conscience.

In a social and democratic state governed by the **rule of law**, parliament has exclusive competence to determine criminal policy and in this enjoys total freedom, subject to certain basic restrictions established by the Spanish Constitution. Thus, the proportionality which has to exist between typical criminal behaviour and the penalty imposed has to be the result of a complex assessment at the discretion of Parliament. To determine whether a given sentence is proportional, the Constitutional Court cannot simply compare it with a standard sentence as if that were the only one that reflected the proportionality required by the Constitution. Neither can it refuse to carry out a substantive review of sentences, because criminal legislation is not exempt from constitutional review.

Summary:

The judicial bodies which initiated this trial challenged the constitutionality of the sentences established by parliament for persons objecting to military service for reasons of conscience and who refused to perform the alternative community service - sentences ranging from two years, four months and a day to six years in prison together with total legal incapacity throughout the period of the sentence - on the grounds that they called for a disproportionate sacrifice of the rights to personal freedom (Article 17 of the Constitution) and to freedom of ideology (Article 16 of the Constitution), to the extent that they inflicted long custodial sentences as a punishment for what was considered an expression of ideological freedom. In addition, these judicial bodies pleaded the violation of Article 25.2 of the Constitution on the grounds that the sentences imposed were designed purely as retribution or punishment and thus, in their view, were lacking in any rehabilitative value.

The Constitutional Court first rejected the violation of Article 25.2 of the Constitution, under which imprisonment and security measures had to serve a rehabilitation and social reintegration purpose. The Court did not consider that the challenged sentence was designed purely as retribution or that Parliament had not intended there to be any preventive effects. Moreover, the Court felt that the argument that such behaviour was not repeated was insufficient to belie the rehabilitative goal of sentences.

Furthermore, the Court did not consider that the right to freedom of ideology had been infringed (Article 16 of the Constitution) because, on the one hand, neither the organisation of, nor services related to, the alternative community service - civil defence, environmental work, social and public health services etc. - inherently implied the performance of activities which could impinge upon the personal convictions of any person who objected to military service and, on the other hand, although a relationship existed between the alternative community service and military service, this could not be used to justify, on the grounds of conscientious objection to military service, refusal to perform the alternative community service provided for in the Constitution (Article 30.2 of the Constitution). Accordingly, the Court held that persons objecting to military service on the grounds of conscience enjoyed the right to be exempted from the duty to perform this service, but that the Spanish Constitution on no account granted them the right to refuse to perform the alternative community service as a way of imposing specific political views concerning the organisation of the armed forces or their complete abolition. Nevertheless, it had to be recognised that if the rule establishing the period and conditions for the performance of the alternative community service exceeded reasonable limits this could infringe the right to object to military service on the grounds of conscience.

As regards the allegation that the rule in question violated the right to personal freedom (Article 17 of the Constitution) on the grounds that the sentence was disproportionate to the offence, the Constitutional Court pointed out that, within the limits set by the Spanish Constitution, Parliament enjoyed a large margin of manoeuvre; this freedom derived from its constitutional position and, in the final analysis, from its special democratic legitimacy and authorised it to determine legally protected interests, criminally punishable acts, the type and scope of penalties and the balance between the conduct which it sought to deter and the penalties by which it attempted to do so. On the basis of this assumption, the Constitutional Court considered that, given the constitutional weight of the aims sought, as established in Article 30.2 of the Constitution, there were no grounds for regarding the sentence imposed as disproportionate. In this respect, it emphasised that the explicit and immediate purpose of the rule was simply to institute alternative community service, which the Constitutional Court had to ensure was strictly respected and which had sprung from a sense of social solidarity geared to collective and socially useful aims. In addition to serving the above-mentioned purpose, this rule was designed indirectly to maintain the effectiveness of the constitutional duty to contribute to the defence of Spain (Article 30 of the Constitution), given the fact the community service was designed to

replace military service. Refusal to perform this community service was punished under the challenged rule, which was binding on all those exempted from compulsory military service for reasons of conscience.

In addition, the Constitutional Court considered neither the imposition of a custodial sentence nor its length disproportionate and therefore considered that such a sentence certainly served a purpose, contrary to what the appellant had asserted, on the grounds that the service which the offender had avoided currently lasted thirteen months, and therefore entailed giving up a considerable part of one's personal and family life and being bound by the discipline of the activity performed during this service. Moreover, the Court added first that all persons refusing to perform military service should receive the same sentence and second that failure to fulfil certain other general social duties established by the Spanish Constitution was also punishable by custodial sentences similar to those provided for in this case. Finally, the Constitutional Court felt that a reasonable balance had been struck between the offence and the sentence, given the constitutional weight of the aim of the rule challenged before the Constitutional Court.

Supplementary information:

One judge issued a dissenting opinion against this judgment.

Languages:

Spanish.

ESP-1994-3-029 17-10-1994 270/1994

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 17-10-1994 / **e)** 270/1994 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 279, 3, 22.11.1994 / **h)** .

Keywords of the Systematic Thesaurus:

1.3.5.12 **Constitutional Justice** - Jurisdiction - The subject of review - Court decisions.
3.13 **General Principles** - Legality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.14 **Fundamental Rights** - Civil and political rights - *Ne bis in idem*.

Keywords of the alphabetical index:

Sanction, disciplinary.

Headnotes:

It is a violation of the principle of *ne bis in idem* to use military disciplinary measures to punish a member of the Guardia Civil three times for the same act.

In a State governed by the **rule of law**, leading a particular lifestyle, however open to criticism it may be, does not of itself justify the imposition of disciplinary sanctions.

Summary:

The appellant, a member of the Guardia Civil, appealed to the Constitutional Court against the judgment of the Supreme Court upholding a decision of the Ministry of Defence imposing an extraordinary sanction of dismissal. The judgment held that the requirements for such action set out in the law governing the discipline of the armed forces had been met («the accumulation in his personal file of unfavourable reports or notes which cast doubt on his qualifications or professional ability» and «conduct gravely prejudicial to the discipline

of the service or to military dignity, constituting an offence») following a press conference given by the appellant without the authorisation of his superiors. This action led to the opening of three disciplinary files: two ordinary files for serious misconduct (using the media to make statements contrary to military discipline) and one extraordinary file which formed the basis for the decision appealed against. Before the press conference, the appellant had been disciplined for three minor offences which, at his request, had finally been deleted from his file. However, the deletion did not cover punishment for serious misconduct imposed for having committed a minor offence when three minor offences for which he had been placed under arrest had already been entered in his file and had not been deleted (i.e. the three minor offences subsequently deleted). It should be noted that the minor offence and the serious misconduct mentioned above were both taken into account in the decision to dismiss him.

Languages:

Spanish.

SUI-2003-3-010

09-07-2003 1P.1/2003 Schweizerische Volkspartei der Stadt Zürich (SVP), Meier and Tuena v. Executive Council of the City of Zurich, Zurich District Council and Cantonal Government of Zurich

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 09-07-2003 / **e)** 1P.1/2003 / **f)** Schweizerische Volkspartei der Stadt Zürich (SVP), Meier and Tuena v. Executive Council of the City of Zurich, Zurich District Council and Cantonal Government of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 I 232 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

4.9.2 **Institutions** - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy.
5.2.2 **Fundamental Rights** - Equality - Criteria of distinction.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.
5.3.13.18 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.
5.3.32.1 **Fundamental Rights** - Civil and political rights - Right to private life - Protection of personal data.
5.3.41.3 **Fundamental Rights** - Civil and political rights - Electoral rights - Freedom of voting.

Keywords of the alphabetical index:

Referendum, request, political right, violation / Naturalisation, referendum / Referendum, vote, secrecy, no possibility of stating reasons.

Headnotes:

Nullity of a request to submit applications for naturalisation to a referendum (Articles 29.2, 34.2 and 13 of the Federal Constitution).

Decisions refusing naturalisation are subject to the obligation to state reasons under Article 29.2 (right to be heard) in conjunction with Article 8.2 of the Federal Constitution (prohibition of all discrimination; points 3.3 and 3.4).

A referendum does not guarantee a statement of reasons that satisfies the constitutional requirements (points 3.5 and 3.6). A request to submit applications for naturalisation to a referendum thus infringes the constitutional right to a decision stating reasons.

Conflict between the duty to inform the authorities about the personal situation of applicants, inferred from the freedom to vote (Article 34.2 of the Federal Constitution; point 4.2) and the right to protection of their private and secret sphere (Article 13 of the Federal Constitution; point 4.3). Those conflicting fundamental rights appear to be impossible to reconcile in this particular case (point 4.4).

The defects in the request for a referendum, from the viewpoint of a State governed by the **rule of law**, cannot be justified by the democratic principle (point 5).

Summary:

The Democratic Union of the Centre, a political party, lodged a request for a referendum with the authorities of the City of Zurich. The request sought an amendment of certain municipal provisions with a view to submitting requests for naturalisation to a referendum. The city parliament declared the request void and refused to put it to a referendum. That decision was upheld by the Cantonal Government of Zurich.

Claiming that there had been a violation of their political rights, the Democratic Union of the Centre and a number of citizens brought a public-law appeal; they requested the Federal Court to declare the request for a referendum valid and to put it to the vote. The Federal Court dismissed the appeal.

The right to be heard is guaranteed by Article 29.2 of the Federal Constitution. It follows that the authorities are under an obligation to state the reasons for their decisions so that the individual is able to determine the scope of a decision and the reasons on which it is based and, if appropriate, mount an effective challenge by bringing an appeal. The right to be heard and to receive a decision stating reasons is applicable in any procedure capable of affecting the individual in his legal position as a party. In the past, decisions on naturalisation (whether granting or rejecting an application) were regarded as purely political acts, issuing from a body by virtue of a discretionary power and not requiring a statement of reasons. Nowadays, on the other hand, decisions on naturalisation are regarded as specifically affecting the status of foreigners and as concerning them in the same way as any other administrative decision. A foreigner is therefore entitled to be given a hearing in the naturalisation procedure and to receive a decision stating reasons.

The obligation to state reasons for decisions on naturalisation may also be inferred from the constitutional prohibition on all discrimination. There is discrimination within the meaning of Article 8.2 of the Federal Constitution where a person (or group of persons) is placed at a disadvantage on the grounds, in particular, of origin, race, language or religious or political convictions. In order that the persons concerned may know whether or not a naturalisation measure is discriminatory, the relevant decision must contain a statement of reasons.

The obligation to state the reasons on which an administrative decision is based does not depend on the body taking the decision. It applies equally to the administration, the parliament or the people voting in a referendum. Every body that and every person who exercises a function of the State is required under Article 35.2 of the Federal Constitution to respect fundamental rights and to guarantee the right to be heard.

For those reasons, decisions on naturalisation must state reasons. The referendum procedure does not satisfy that requirement. Owing to the principle of the secrecy of the vote, it is not possible to know the reasons which led to the acceptance or rejection of an application for naturalisation. There are no valid alternative methods. It follows that the procedure of submitting applications for naturalisation to a referendum infringes constitutional law.

In the case of a referendum, there is also a contradiction between the citizen's right to vote within the meaning of Article 34 of the Federal Constitution and the foreigner's right to protection of his private sphere within the meaning of Article 13 of the Federal Constitution. The guarantee of political rights requires that citizens have the necessary information to form an opinion and to express it by voting. In the case of applications for naturalisation, that information concerns very personal data relating to the applicants, in particular indications of origin, personal and family situation, second occupations, mastery of the local language, etc. The disclosure of that information may be inconsistent with the protection of the private sphere enjoyed by the

applicants, who would thus be exposed to wide publicity. That conflict cannot be resolved satisfactorily.

For those reasons, the request for a referendum at issue was not consistent with constitutional law and could not be declared valid.

Languages:

German.

SUI-2002-3-005 26-08-2002 1P.91/2002 Botta et al. v. Canton of Graubünden

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26-08-2002 / **e)** 1P.91/2002 / **f)** Botta et al. v. Canton of Graubünden / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 I 327 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** - Separation of powers.
3.13 **General Principles** - Legality.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
3.18 **General Principles** - General interest.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.

Keywords of the alphabetical index:

Order, content, general clause / Law and order, protection and keeping / Police, powers.

Headnotes:

Order on the Cantonal Police Force issued by the Grand Council of Graubünden, right to issue orders on police measures to protect law and order, principle of the separation of powers, general policing clause, restriction of fundamental rights.

The powers of the Grand Council to legislate by way of order on police matters within the framework of the general policing clause; no violation of the principle of the separation of powers (Point 2).

An order of the Grand Council is a formal legal basis for the restriction of fundamental rights. The principle of the **rule of law** and the requirement of sufficiently detailed legal rules in police matters. Proportionality of the measures for maintaining order (measures prohibiting access, creation of prohibited zones and temporary seizure of objects) (Point 4).

Summary:

The Grand Council of the Canton of Graubünden (Cantonal Parliament) partially amended the Order on the Cantonal Police Force by adding a provision on policing measures to protect law and order. This provision generally sets out that with a view to protecting law and order and preventing various public dangers, the police may implement measures as dictated by the particular situation. In particular, the police may order individuals out of a specific place or area, prohibit access to specified buildings, grounds or areas, prohibit loitering in such areas, and temporarily confiscate objects presenting a danger or liable to be used in a dangerous manner. In the explanatory memorandum to the draft amendments, the Government of the Canton of Graubünden pointed out that the Cantonal Police Force was having to cope with an increasing workload in terms of protecting law and order and public safety and needed additional powers in order to meet these new

needs. The new provision was needed, *inter alia*, to ensure the proper supervision of such major events as the Davos Economic Forum and the world skiing championships.

A number of individuals lodged a Constitutional complaint asking the Federal Court to quash this new provision, claiming that it violates the principle of the separation of powers and certain fundamental rights, such as personal freedom. The Federal Court dismissed the complaint.

In accordance with the Constitution of the Canton of Graubünden, the Grand Council may issue orders without holding any compulsory referendum. Given that the Grand Council remained within the framework of the general policing clause, it did not violate the principle of the separation of powers by adding a provision on police measures to protect law and order to the Order on the Cantonal Police Force.

The impugned provision is general in scope. In order to discharge its duties the police force must take the requisite measures to protect law and order and public safety. These measures vary in accordance with the individual situation, and may, for instance, be taken in the wake of a road accident or a disaster with a view to evacuating inhabitants or prohibiting access to certain areas. The impugned provision is therefore closely linked to the general policing clause. Such measures can, however, infringe certain fundamental rights in a variety of ways, including personal freedom, freedom of assembly and opinion and the protection of property.

These fundamental freedoms may be restricted provided that there is a sufficient legal basis for doing so, that the measures taken correspond to a public interest, and that the measures comply with the proportionality rule. According to case-law, a Cantonal Parliament Order which is not subject to referendum is a sufficient legal basis.

The principle of legality requires statutes restricting fundamental rights to be accessible and sufficiently detailed to ensure certainty of the law, foreseeability of State actions and equality of treatment. However, the degree of detail required must not be defined in overall abstractions: rather it depends on the subject under consideration. In the policing field, the principle of legality comes up against very specific difficulties. Police forces are called upon to act in a wide variety of situations. This being the case, the general policing clause enables the authorities to face up to serious, direct and imminent dangers. In the instant case, the Grand Council cannot be blamed for not having set out more detailed regulations on the conditions and measures to be taken in the area of protecting law and order and public safety.

No one can seriously dispute the fact that protecting law and order and public safety corresponds to a public interest. Depending on the actual circumstances, it can sometimes be appropriate to prohibit access to certain places or to carry out evacuations. Moreover, the same applies in cases where demonstrators have asked the authorities to place certain street or squares at their disposal, because in such cases it may prove necessary to adopt special measures to ensure that the demonstration goes off smoothly.

The police force is often involved in situations requiring it to prevent dangers or rescue individuals or objects. Where such interests are at stake, the restrictions to fundamental rights provided for in the provisions complained of are not unreasonable: they are in fact proportional. In the case of "private" demonstrations, the demonstrators, participants, interested parties and third persons may have many opposing interests, which have to be weighed up very carefully. Substitute measures may be adopted to meet the needs of third persons. The complexity of such situations is such as to preclude any definitive appraisal under an abstract review of cantonal regulations by the Federal Court. It is therefore vital that the police implement the impugned provisions in an appropriate manner in each individual situation, in compliance with the proportionality rule.

Languages:

German.

MKD-2004-2-005 30-06-2004 U.br. 40/2003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 30-06-2004 / **e)** U.br. 40/2003 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 48/2004 / **h)** CODICES (Macedonian).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.12 **General Principles** - Clarity and precision of legal provisions.
4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
4.7.1 **Institutions** - Judicial bodies - Jurisdiction.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
5.3.2 **Fundamental Rights** - Civil and political rights - Right to life.
5.3.5.1 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty.
5.3.35 **Fundamental Rights** - Civil and political rights - Inviolability of the home.

Keywords of the alphabetical index:

Police, financial, powers / Investigation, criminal / Detention, conditions and terms / Investigation, preliminary / Search, seizure, documents / Seizure, asset / Search, business premises.

Headnotes:

The principle of the separation of powers and the **rule of law** are put into question by providing the financial police with statutory rights to undertake investigative activities, procedural acts that fall within the competence of the courts.

The search of business premises by financial police officers without a warrant issued by a court endangers the principle of the inviolability of the home.

The detention of persons by financial police officers, which is in substance a restriction of freedom, must be carried out with strict observance of terms and procedure provided by law.

The temporary confiscation and seizure of objects could lead towards the permanent seizure of objects, which falls within the exclusive competence of the courts and cannot be undertaken by the financial police.

The right of financial police officers to use firearms in order to prevent a person from escaping by way of a vehicle could be abused or could prejudice the constitutional principle of irrevocability of human life, human physical and moral integrity and the human right to freedom.

Summary:

Taking the petition into account, the Court struck down several provisions of the Law on the financial police relating to the competencies of the financial police. The Court found that the law in question consisted of ambiguities and imprecise provisions, which ignored some fundamental values set out in the Constitution.

Namely, the law entrusted the financial police with the right to undertake investigation activities against persons under suspicion of being involved in illicit financial activities (money laundering, tax evasion etc.) against the economic interests of the country, of either a national or an international nature. The Court found that entrusting the financial police to undertake investigative activities contradicted the principle of the rule of law and the separation of state powers into legislative, executive and judicial. It confirmed that Law on criminal proceedings sets out the bodies competent to detect, prosecute and judge perpetrators of criminal offences in accordance with the principle of presumption of innocence. According to this law, investigation is a

stage in criminal procedure in which competent state bodies take certain measures where there is suspicion that a person has committed a crime. The investigation is commenced after a public prosecutor's request has been submitted to the investigating judge, who decides whether or not to open or continue the investigation. Therefore, the Court held that an investigation falls exclusively within courts' competence, thereby making the financial police's authorisation to undertake investigative activities a contradiction of the above-mentioned principles, which are set out in the Constitution.

Moreover, the law defined the financial police's scope of reference as including the right to search upon its own initiative or that of the public prosecutor the business premises of persons under suspicion of having committed a crime.

Accepting the petitioner's arguments, the Court took into consideration the fundamental values of the constitutional order as set out in Articles 8.1.1, 6 and 11, as well as Article 26 of the Constitution, which guarantees the inviolability of the home. The Constitution provides for the maximum degree of, if not the absolute, inviolability of the home. The Court interpreted that term as encompassing inviolability of other premises as well. Therefore, the Court held that the jurisdiction of the financial police to search business premises without a warrant issued by a court was not in compliance with the principle of the inviolability of the home.

The Law authorises the financial police to arrest persons under investigation or those who disturb or interfere with the investigation or procedure. Having regard to Article 12 of the Constitution, the Court stated that by guaranteeing the irrevocability of human freedom, the Constitution also provides for the basic conditions under which and the manner in which it may be restricted. Thus, the Constitution states that a person's freedom may not be restricted except by a court decision and in cases and procedures determined by law. This makes any interference and arbitrary action taken by any other body impossible. The Court is the specific guarantor of the irrevocability of human freedoms. The court acts as an independent and autonomous body in which the competence is vested to decide on the restrictions of human freedoms. That being so, the Court held that the statutory provisions entrusting the financial police with the power to arrest persons under suspicion were not in compliance with Article 12 of the Constitution.

The law in question also grants the financial police the statutory right to confiscate goods for failure to produce evidence that taxes have been paid or for a lack of documentation. Also, the police has been granted the right to seize electronic, technical and other devices, which might contain data and information constituting evidence. Since the Court found that the confiscation and seizure of objects were measures which could only be ordered by a court, the Court stated that financial police officers could not be authorised by statute to execute such measures. Financial police officers may only temporarily seize objects that have been used or are intended to be used for perpetrating a crime, and only when they are necessary as evidence in criminal procedure. However, financial police officers may not confiscate or seize objects on a permanent basis.

The Court turned its attention to the right of financial police officers to use firearms in order to prevent a person from escaping by way of a vehicle.

Article 10 of the Constitution lays down the irrevocability of the human right to life. The human right of physical and moral dignity is set out in Article 11 of the Constitution. According to Article 12 of the Constitution, the human right to freedom is irrevocable and no person's freedom may be restricted except by a court decision and in cases and procedures determined by law. When examining the constitutionality of the provision at stake, the Court paid attention to the wording of Article 2 ECHR and concluded that the irrevocability of the human right to life and physical and moral integrity amounts to an essential precondition for attaining other human rights and freedoms. The attainment of that right cannot be at the cost of prejudicing its attainment by other persons. Consequently, every society reserves the right to use necessary force in the manner determined by law.

The justification of providing the police with the right to use certain elements of force should be sought in the compromise that should be created between freedom and security, as well as the necessity of striking a balance between the control of crime, as a public interest, and respect for human rights and freedoms. The

use of ultimate force is not accepted by any society, which implies that even in the most extreme cases of criminal behaviour, the concept of the use of ultimate force by the police, i.e. the financial police, should be avoided. The right to use force is justified only if it aims at eliminating a force of higher magnitude i.e. in cases where it is used, the extent and scope of the force must comply with the aims to be achieved.

Since the right of financial police officers to use firearms in order to prevent escape of persons by way of a vehicle contains a certain level of risk of abuse and does not fit within measures and standards for the justified use of necessary force, the Court struck down the statutory provision that granted the financial police such a right.

Languages:

Macedonian.

MKD-2001-3-008

12-09-2001 U.br. 10/2001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12-09-2001 / **e)** U.br. 10/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 78/2001 / **h)** CODICES (Macedonian).

Keywords of the Systematic Thesaurus:

3.5 **General Principles** - Social State.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
4.6.9 **Institutions** - Executive bodies - The civil service.
5.2.1.2.1 **Fundamental Rights** - Equality - Scope of application - Employment - In private law.
5.2.1.2.2 **Fundamental Rights** - Equality - Scope of application - Employment - In public law.
5.2.1.3 **Fundamental Rights** - Equality - Scope of application - Social security.
5.4.3 **Fundamental Rights** - Economic, social and cultural rights - Right to work.

Keywords of the alphabetical index:

Civil servant, dismissal / Dismissal, different criteria / Employee, discrimination / Employment, termination / Labour law.

Headnotes:

The right to work is one of the fundamental human rights guaranteed by the Constitution, which cannot be specified or altered according to specific circumstances. Since the Constitution does not make any distinction between employees in the economic and non-economic sectors, the legislature is obliged to put individuals in an equal legal position with respect to rights, duties and responsibilities deriving from labour relations, the creation and termination of employment, social security and retirement.

The state is obliged to respect the constitutional obligation to treat the beneficiaries of these rights equally and to create such conditions where equal rights would refer to all persons being in same position.

Redundancies for public sector employees only, the lack of objective criteria and terms for its enforcement, as well as difference in the quality of rights of this category of employees violates the constitutional principles of equality, the **rule of law** and legal certainty.

Summary:

Judging upon a petition lodged by several individuals and legal entities, the Court repealed the statute amending the Law on labour relations. Under the disputed Law, the attainment of rights, duties and responsibilities of an employee and employer and the creation and termination of employment can be regulated by other laws besides the Law on labour relations.

The core issue of the petition was the introduction of a new method of redundancy, which was reserved for one category of employees only - those in the public sector.

The Law at issue introduced "redundancy due to office requirements" as a specific way of employment termination. It also provided for more accurate regulation of issues related to employment termination in this way.

The employment terminates by dismissal due to office requirements if:

1. state and local self-government units and bodies of the city of Skopje, public undertakings and institutions, funds and other organisations and institutions set up and owned by the state or set up by virtue of law would cease working or would be dissolved;

2. these institutions are undergoing internal reorganisation;

3. there is a loss of competencies or the scope of work has narrowed; and

4. there have been other organisational changes that bring about redundancy.

The Law has also defined the rights to which the newly redundant employee is entitled to:

1. the right to a retirement pension, if certain criteria are met; and

2. the payment of redundancy money under certain circumstances.

While judging the constitutionality of the disputed Law, the Court took into consideration the fundamental values of the constitutional order and provisions, which refer to individuals' equality, the right to work and the rights and positions of employees. It also examined the values inherent in social security and social insurance legislation.

Article 8 of the Constitution specifies the fundamental values of the constitutional order. Amongst these are: human rights and freedoms acknowledged in international law and established by the Constitution, the rule of law, humanism, social justice and solidarity.

Article 9 of the Constitution safeguards the equality of persons in respect to their rights and freedoms, as well as before the Constitution and laws.

Article 32 of the Constitution *inter alia* sets out that each person is entitled to work and material safety in time of temporary unemployment, provided that employees' rights are attained and their position is regulated by law and collective agreements.

Labour relations are determined by a contract established between the employee and employer stipulating some things to be done and rights and duties deriving there from to be enforced. The employee sets up the employment on voluntarily basis, under a method and terms stated by law and collective agreement. The Law on labour relations and collective agreements regulate the terms and processes of employment termination, including the forms and ways of employees' rights to protection in such cases. The Law prescribes several ways of employment termination: upon agreement, after the expiration of the period of employment, by virtue of law, or by dismissal due to economic, technological, structural or similar changes.

The Law, which was subject matter of Court examination in this case introduced an additional way of employment termination referring to public sector employees only: dismissal due to office requirements. Besides, it set out specific rights, different from those to which employees are entitled to in case of

employment termination described above.

In the Court's opinion, the Constitution proclaims the right to work and material safety in case of temporary unemployment, provided that employees' rights are regulated by law and collective agreements. Social protection and social security of persons, which are defined as common constitutional principles, are based on state social character, provided that the legislature regulates the rights and their scope. That means that the Constitution does not determine the attainment and scope of labour and social insurance rights, but it forces the legislature to regulate it. However, laws dealing with labour and social insurance issues must determine such principles, which would equally refer to all, i.e. employees or the unemployed.

After analysing the Law at issue, the Constitutional Court concluded that its provisions prescribed a specific way of employment termination in cases where the state was in the position of employer. Although it authorised the state to decide on possible rights to which the employee dismissed was entitled, it was obliged to ensure an effective protective mechanism regarding employees' legal safety.

In coming to its decision, the Court looked at several issues. As regards rights, duties and responsibilities deriving from employment, including its creation and termination, the legislature is bound to safeguard the equal legal position of persons.

Labour relations are a unique category of contractual relations between the employee and employer referring to all employees equally, regardless of their activities or sphere of work. The right to work is a universal one, and does not depend on the sector in which it is enforced. The Court judged that the principle of equality is also jeopardised as regards the quality of rights relating to employees, who have been made redundant due to office requirements. In the Court's opinion, the law at issue put the employees in the public sector in an advantageous position.

Since the Law in question did not establish terms and criteria to which the employer would be bound when dismissing employees due to office's requirements, the Court found that employees' legal safety was jeopardised as well. On the other hand, it also restricted the possibility for protection of employees, whose employment had ceased on these grounds. The lack of objective criteria, whereby the termination of employment would depend on an employer's will, was held by the Court to breach the fundamental principle of the rule of law. Due to the reasons stated, the Court ascertained the alleged unconstitutionality of the Law amending the Law on labour relations.

Languages:

Macedonian.

MKD-2001-1-002 28-02-2001 U.br.45/20(

U.br.61/20(

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 28-02-2001 / **e)** U.br.45/2000; U.br.61/2000 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 23/2001 / **h)** CODICES (Macedonian).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
3.17 **General Principles** - Weighing of interests.
3.18 **General Principles** - General interest.
4.5.10.2 **Institutions** - Legislative bodies - Political parties - Financing.
5.2 **Fundamental Rights** - Equality.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.
5.4.6 **Fundamental Rights** - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Asset, private property / Competition, economic, protection / Market entity, equal legal position.

Headnotes:

An imprecise statutory provision provides wide margins for different interpretations and applications in practice which can hinder the **rule of law**. Political parties are civil, not trade associations. They attain objectives of global, not partial, social interest. Political parties cannot raise funds from trade activities, which are beyond political exercise, because it would violate the freedom of market and entrepreneurship and would jeopardise the equal legal position of all market entities.

Summary:

The Democratic Alliance from Skopje lodged a petition with the Court challenging the constitutionality of Article 28.1 of the Law on Political Parties.

The provision at issue ascertained the financial resources that political parties can make use of while exercising their activities. According to this article, political parties can raise funds from membership fees, contributions, revenues from their own assets, credits, donations, grants and from the state budget. What was challenged and nullified by the Court referred to the revenue parties could earn from their own assets.

In its reasoning, the Court primarily considered the legal position and objectives of political parties. Thus, Article 2 of the law defines political parties as organised groups of citizens pledging to participate in the government. Article 3 therefore determines the objectives of political parties: to enforce and safeguard the political, economic, social, cultural and other rights and beliefs of their members; to take part in making political decisions; to be involved in the process of election of representatives in the National Assembly and in municipalities' assemblies and of the city of Skopje. Article 20 of the Constitution safeguards freedom of association. Citizens can exercise this right to safeguard their political, economic, social, cultural and other rights and convictions.

This definition of the position and objectives of political parties was the starting point for the Court to determine its findings. Political parties are civil associations. The performance of their tasks is not of direct material interest for a limited group of citizens (the members of that party). They accomplish objectives of global and general interest for society that are of a political, economic, social, cultural and civil nature. Thus, political parties are a counterbalance in society to other groups of citizens and individuals whose interests are material and partial, and can be accomplished individually or in association. In the Court's opinion, this enables the existence of different value structures in society, the mutual interaction of which ensure its development and democratisation.

The Court partially rejected the provision in question, allowing parties to raise funds from revenues from their own assets, for several reasons. First, because of its imprecise content, which can induce different interpretations and application in practice. This imperils the principle of the rule of law, a fundamental concept of the constitutional order. Second, it jeopardises the constitutional concept of the functions and objectives of political parties. Third, such activity employed by political parties can violate one of the economic bases of the country enshrined in Article 55 of the Constitution: freedom of market and entrepreneurship and the equal legal position of all market entities.

Languages:

Macedonian.

MKD-2000-2-005 12-07-2000 U.br.220/9

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12-07-2000 / **e)** U.br.220/99 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 57/2000 / **h)** CODICES (Macedonian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
3.9 **General Principles** - Rule of law.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2.1.2.1 **Fundamental Rights** - Equality - Scope of application - Employment - In private law.
5.2.2.6 **Fundamental Rights** - Equality - Criteria of distinction - Religion.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.

Keywords of the alphabetical index:

Employer, employee, relations / Holiday, religious / Religion, affiliation, evidence.

Headnotes:

The enjoyment of a statutory based right (the right to leave during a religious holiday) which derives from exercising a certain freedom (freedom of religion) has to be based on objective facts supported by evidence. The **rule of law**, understood as the supremacy of objective legal norms over subjective will and the existence of relatively objective criteria for ascertaining a citizen's affiliation to a certain religious belief, requires the determination of objective facts related to such a right being enjoyed.

Summary:

The Court refused an individual's request for protection from discrimination based on religious affiliation resulting from a judgment of the Court of Appeal. Due to a lack of procedural presumption for decision-making, stated by the Rules of procedure of the Court (expiration of two months after delivery of the act), it rejected the request in part dealing with singular acts, which in the petitioner's opinion violated his right.

The petitioner's request was based both on procedural and substantive grounds. The procedural ground referred to the constitutional protection of human rights and freedoms before regular courts and the Constitutional Court, through a procedure based upon the principles of priority and urgency (Article 50 of the Constitution). The substantive ground took into consideration several principles:

- the principle of equality of citizens in enjoying their rights and freedoms (Article 9 of the Constitution);
- the constitutional right of citizens freely to express their confession (Article 19 of the Constitution);
- the impossibility of individual rights and freedoms being withheld because of affiliation to or practice of a certain religion, including the impossibility of a ban on becoming a member of a religious community (Article 4 of the Law on religious communities and religious groups);
- Articles 9 and 14 ECHR, which guarantee everyone the freedom to manifest his/her religion, provided that the enjoyment of rights and freedoms is without discrimination based on any religion.

The facts of the case were as follows. The petitioner, a Macedonian who celebrated Christian holidays, left his

office two working days on the first days of *Ramazan Bajram* and *Kurban Bajram* - holidays in the Muslim religion. Since he did not obtain leave, in first instance he was dismissed, which was later replaced with a fine. The petitioner justified the leave on the ground that he accepted the Muslim religion. Therefore, those days were not working days for him (according to the Law on holidays in the Republic of Macedonia) and he could not be made to bear any damaging consequences on that account. However, neither the employer nor the courts in two instances accepted his claim that he accepted the Muslim religion, and considered that his leave was unjustified.

The fact that the petitioner's claim that he is affiliated to the Muslim religion was not accepted and that he was asked to prove such religious belief meant that the petitioner felt discriminated against. In his opinion, the Constitution guarantees the freedom of religion as a personal conviction, the expression of which is part of one's privacy and therefore no one is obliged to prove it. The petitioner based the protection of his rights and freedoms only on his claim that he was affiliated to the Muslim religion indicating that neither he nor anyone else should be required to prove such an assertion.

In making its decision, the Court found it crucial to settle the following preliminary question: is the expression of the citizen's will sufficient to enjoy a certain right deriving from a freedom or must the citizen rely on objective facts which should be supported by evidence?

Taking into account that the rule of law is one of the fundamental principles of the constitutional order and that there are objective criteria for ascertaining a citizen's affiliation to a particular religion, the Court judged that objective facts related to the enjoyment of a right have necessarily to be verified. Taking the rule of law as the supremacy of objective legal norms over subjective will, and after a public hearing and several consultations had been held, and especially bearing in mind the petitioner's statement, the Court found that the contents and form of his religious belief did not objectively correspond to that of the Muslim religion on several grounds. For example, he did not know the basic premises of that religious system, through which the essence of such belief is expressed; nor did he know how to enter this belief. Therefore, the Court found that the petitioner had not been discriminated against by the Court of Appeal's judgment, i.e. the fact that the court entered into fact-finding and determined objective facts had not put the petitioner in a disadvantageous position in comparison to other citizens based on his religious belief.

Languages:

Macedonian.

MKD-1999-2-005 12-05-1999 U.br.217/9

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12-05-1999 / **e)** U.br.217/98 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 33/99 / **h)** CODICES (Macedonian).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.17 **General Principles** - Weighing of interests.
3.23 **General Principles** - Equity.
4.6.2 **Institutions** - Executive bodies - Powers.
5.3.35 **Fundamental Rights** - Civil and political rights - Inviolability of the home.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Housing, unlawful occupation.

Headnotes:

Where an apartment is occupied illicitly without a lease agreement having been concluded, the owner is entitled to the return of the apartment into his/her possession with preliminary assistance by the appropriate authority under certain conditions. Statutory determination of this issue requires observance of the constitutional principles of the separation of state powers and the **rule of law**.

Summary:

Judging upon the petition challenging the Law on Housing, the Court found that Article 11 of the Law was not in compliance with the constitutional principles of the rule of law and the separation of state powers. According to the disputed provision, in cases of the illicit occupation of an apartment by a person without a lease agreement having been concluded, the owner is entitled to the return of the apartment into his/her possession with preliminary assistance by the appropriate authority, without an administrative or court procedure having been commenced.

Article 26 of the Constitution guarantees the inviolability of the home, and also provides for certain conditions when this right may be restricted: in cases necessary for detention or the prevention of criminal offences or the protection of people's health. Such restrictions may, however, only be imposed on the basis of a court decision. Bearing in mind the significance of the home as the primary condition for freedom of living and work, it follows that the Constitution guarantees maximal, i.e. almost absolute inviolability of the home. The object of constitutional protection is only an owned or otherwise legally acquired home and not an apartment which someone has entered illegally, without a concluded agreement. Therefore, the constitutional protection applies only to cases where the home is acquired legally. The occupation of an apartment without the agreement of the owner constitutes a violation of the rights of others and repossession is undertaken in order for some lawful right to be protected (self-protection). A preliminary call for assistance by the appropriate authority for repossession by the owner or beneficiary means the protection of one person's own right against another person's lack of right. The principle of the rule of law means not only observance of the legal order, but also respect of the rights of others. Justice and fairness, as constituent elements of the rule of law, impose an obligation for all to be restrained from violating the rights of others.

However, the Court found that although the disputed provision is based on the notion of self-protection in the civil sense, which is regulated by the Law on Basic Proprietary-Legal Relationships and the Law on contracts, it does not provide for conditions and terms for its enforcement. Therefore, it found the provision to be in conflict with the constitutional principle of the rule of law.

The power of the relevant authority to provide assistance to the owner while he/she is in the process of repossessing the apartment, without any decision being adopted by a competent body, calls into question the fundamental constitutional value of the division of state powers into legislative, executive and judicial branches.

Languages:

Macedonian.

TUR-2003-1-003 17-11-1998 K 1998/70

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 17-11-1998 / **e)** K 1998/70 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24994, 15.01.2003 / **h)** CODICES (Turkish).

Keywords of the Systematic Thesaurus:

5.1.1.4.2 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Incapacitated.
5.2.1.3 **Fundamental Rights** - Equality - Scope of application - Social security.

5.4.14 **Fundamental Rights** - Economic, social and cultural rights - Right to social security.
5.4.18 **Fundamental Rights** - Economic, social and cultural rights - Right to a sufficient standard of living.
5.4.19 **Fundamental Rights** - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Incapacity, occupational, temporary / Illness / Insurance, social, allowance, duration period.

Headnotes:

The principle of the social state governed by the **rule of law** provided in Article 2 of the Constitution means that the State has the duty to deal with the social conditions and welfare of its citizens and to provide a minimum of standard of living. The limitation on the period of receiving benefits for inability to work is contrary to the Constitution insofar as, from the point of view of social security, there is no difference between an illness caused by working conditions and other kinds of illnesses.

Summary:

The 10th Chamber of the Court of Cassation applied to the Constitutional Court alleging that Article 37.1 of the Law on Social Security was contrary to the Constitution. According to the alleged provision, benefits for inability to work were limited to 18 months. That is to say, where a worker is temporarily unable to work because of an illness caused by working conditions, his or her benefits for inability to work are paid only for 18 months. Even though the illness lasts for more than 18 months, the benefits are not paid under the provisions of the Law on Social Security.

According to Article 11 of the Law on Social Security, where a worker is unable to work because of an illness caused by working conditions, there is no time-limit for receiving benefits for inability to work. On the other hand, where a worker is unable to work because of an illness other than one caused by working conditions, the benefits are granted for 18 months. The Constitutional Court noted that whether a worker was unable to work either because of an ordinary illness or an illness caused by working conditions, he/she would not receive his/her wage. Whatever the reason, there was no difference between the two kinds of workers with illnesses, since both groups of workers were unable to work. Consequently, it was contrary to Article 10 of the Constitution, i.e. the principle of equality.

Moreover, Article 17.1 of the Constitution provides: "...[e]veryone has the right to life and the right to protect and develop his material and spiritual entity". A duty was imposed on the State to remove all kinds of obstacles to these rights. The State should protect the weak in society against the powerful. For that reason, regulations on social security must not contain any provisions that considerably harm or abolish "the right to protect and develop his material and spiritual entity".

Under the impugned provision, the benefits for the temporary inability to work are limited to 18 months, even though a worker is still undergoing treatment. At the end of that period, the benefits are cut off. That kind of limitation is not compatible with "the requirements of the democratic order of the society" as set out in Articles 13 and 17 of the Constitution.

According to Article 60 of the Constitution "Everyone has the right to social security. The state shall take the necessary measures and establish the organisation for the provision of social security." This provision is aimed at providing a minimum and humanitarian standard of living against social risks such as senility, maternity, accident, disability and illness. Social security is one of the most fundamental means of ensuring the happiness of the individual within the society. In modern times, the social state governed by the rule of law is under the obligation to protect individuals against social risks and to ensure the individuals can look forward confidently. One of the institutions founded to accomplish these duties is the Institution of the Social Security; it has the duty of administering the social security system.

Since the right to social security set out in Article 60 of the Constitution is related to the right to protect and develop the material and spiritual entity of individual, the State must not adopt or implement any rules that restrict or abolish the right to live.

Under the impugned provision, the benefits for the temporary inability to work are cut off after 18 months. Consequently, while a worker enjoys the benefits of health insurance, he/she is deprived of the financial support that would enable him/her to continue living. It is clear that Article 11 of the Law on Social Security interrupts the right to social security and leaves the worker without any security in his/her life.

For these reasons, the Constitutional Court found that the impugned provision was in conflict with Articles 2, 10, 13, 17 and 60 of the Constitution and that it should be annulled.

Languages:

Turkish.

TUR-2001-1-003 19-09-2000 K.2000/23

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 19-09-2000 / **e)** K.2000/23 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the Systematic Thesaurus:

1.2.1 **Constitutional Justice** - Types of claim - Claim by a public body.
1.3.2.3 **Constitutional Justice** - Jurisdiction - Type of review - Abstract review.
3.20 **General Principles** - Reasonableness.
5.2.2 **Fundamental Rights** - Equality - Criteria of distinction.

Keywords of the alphabetical index:

Status, legal, inequality / Sentence, suspension.

Headnotes:

Any state governed by the **rule of law** should be based on human rights and should preserve and strengthen those rights. All acts should be in conformity with law and consistent with the Constitution. They should be open to judicial review. The legislator has the responsibility to ensure that laws are in congruence with the Constitution and with universal legal principles.

Everyone is equal before the law without discrimination on any ground such as language, race, religion, colour, sex, political or other opinion. This principle is valid for people whose legal status is the same; but equality before the law does not mean that everyone must be bound by the same rules in every aspect.

The legislator has the right to legislate the actions that shall be deemed as an offence and the punishments that shall be applied to those offences provided that it is in conformity with the Constitution and with the general principles of criminal law. It also has the right to provide regulations on suspensions of judgments. However, everyone who is in the same situation must be treated equally.

Summary:

Act 4454 suspended the execution of judgments related to offences that have been committed by means of press, oral or televised media in conjunction with expression. In order to get the benefit from that suspension, imprisonment in the related criminal provisions should not exceed 12 years. In addition, prosecutions of related offences and judgments of pending cases have been suspended in certain situations. Thus, if those

crimes have been committed by means other than press, oral or televised media, the suspension shall not be applied.

Under the Turkish Constitution, the major opposition party has the right to challenge any law after its promulgation in the Official Gazette within 60 days if it considers that the related provision or provisions of a certain law unconstitutional. The main opposition party applied to the Court asserting that the provision in the related law is not in conformity with Articles 10 and 2 of the Constitution (the principle of equality and the rule of law, respectively).

The equality principle is one of the basic principles of law and is regulated in Article 10 of the Constitution. No privilege may be given to a person, a certain family or a certain community. State authorities and administrative bodies must apply the equality principle in all their acts. The principle is valid for individuals who are in the same legal position. The aim of this principle is to ensure individuals in the same legal position are treated equally and that discrimination is forbidden.

Article 1/1 of Law no. 4454 suspended the execution of judgments related to crimes that have been committed by means of press, oral or televised media if the crime has been committed before 23 April 1999. The legislator has the right to regulate which actions shall be deemed as offences and what the appropriate punishment should be for different offences. It also has the competence to determine aggravating and attenuating circumstances. It even has the competence to regulate the suspension of imprisonment and prosecution of offences. If such a regulation is made, all individuals of the same status should be treated equally. In order to determine different provisions, there should exist valid reasons such as national security, public interest and public order.

The challenged provisions brought the suspension of certain crimes committed by means of press, oral or televised media in conjunction with expression. But the suspension did not include crimes committed by other means in spite of their short-term imprisonment. It is clear that this kind of difference in regulations does not have sound reasoning. Moreover, it may not be asserted that it is just and constitutional to bring the suspension for serious crimes and not to bring the suspension for less serious offences within the same field. For those reasons the challenged provision is contrary to Articles 2 and 10 of the Constitution. It should be annulled.

Judges Mr Bumin, Mr Acargün, Mr Hüner and Mr Ilýcak delivered dissenting opinions.

Languages:

Turkish.

TUR-1997-2-003 28-09-1995 1995/53

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28-09-1995 / **e)** 1995/53 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 16.05.1997 / **h)** .

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
5.1.1.1.1 **Fundamental Rights** - General questions - Entitlement to rights - Nationals - Nationals living abroad.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.2 **Fundamental Rights** - Equality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.

Keywords of the alphabetical index:

Divorce, abroad / Judgment of foreign country.

Headnotes:

All individuals are equal before the law without any discrimination and irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privileges can be granted to any individual, family, group or class. State organs and administrative authorities must act in compliance with the principle of equality before the law in all their proceedings.

The **rule of law** signifies a system where governmental agencies must operate within the framework of law, and their actions are subject to review by independent judicial authorities.

Summary:

The Utrecht Court of First Instance had given a final verdict concerning the divorce of the plaintiff husband S.O., a citizen of the Republic of Turkey, from his wife E.A., a citizen of the Kingdom of the Netherlands, in accordance with the regulations of Dutch Civil Law. The verdict was registered in the documents of the Registration Office of the Utrecht Municipality.

During further proceedings in Turkey to recognise the Utrecht verdict, in which the plaintiff was represented by his attorney, the court decided to give notice to the defendant wife by sending a copy of the Utrecht judgment concerning the divorce to her resident address. The defendant must be given notice concerning the date and time at which he or she must appear before the court. This notice is made obligatory by Article 183 of the Code of Civil Procedure. However, due to the fact that the necessary fees had not been paid by the plaintiff, notice to the defendant wife who had taken up residence in another country could not be given and, for this reason, the court did not deliver a recognition decision.

The plaintiff's attorney claimed that, in cases where it is obligatory to provide information about the judgment of foreign courts, Article 183 of the Code of Civil Procedure, which provides that notice must be given to the defendant, is unconstitutional. The Turkish Court found that this article of the Code is unconstitutional and referred a constitutional claim to annul the said article to the Constitutional Court. The consideration of the case was postponed until the Constitutional Court had decided on this issue.

The Constitutional Court stated that, as it has to be considered as part of the natural rights of the defendant to be informed of the opening of a case when notified about the petition, to use, within a defined period of time, the right to answer claims which are put forward, to defend him/herself, to submit evidence to the contrary, and to attend oral proceedings, as well as showing respect towards these rights of the defendant are necessary requirements determining a State governed by the rule of law. Regarding conformity with said rules, it can have no effect whatsoever if the defendant is a Turkish citizen or a foreigner, or if he/she resides in Turkey or in a foreign country. Likewise Article 73 of the Law of Civil Procedure states that, except in cases which are specified by the law, the judge will not be able to give a final verdict if he/she has not heard both parties to the case, or has not called them to appear in court in conformity with legal ways and means to give an opportunity to advance claims and defences. For these reasons, the objected rule cannot be considered contrary to the principle of the rule of law stipulated in Article 2 of the Constitution.

Article 183 of the Law of Civil Procedure, which was the subject of contention of unconstitutionality before the court of first instance and referred to the Constitutional Court, states that without consideration of the fact that a mutual agreement should have been concluded concerning characters of certain cases, or the country of residence, persons residing in foreign countries have necessarily to be given notice on which day and at which time they have to present themselves at court. Due to the above-mentioned reasons, the rule which was the subject of review has been found not to be unconstitutional under the aspects of the constitutional principle of equality.

Therefore the Constitutional Court dismissed the case.

The decision was taken unanimously.

Languages:

Turkish.

TUR-1996-1-001 28-06-1995 1995/23

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28-06-1995 / **e)** 1995/23 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 20.03.1996 / **h)** .

Keywords of the Systematic Thesaurus:

3.9 **General Principles** - Rule of law.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Concession / Contract, administrative.

Headnotes:

According to the Constitution, the Republic of Turkey is defined as a democratic, secular, and social State governed by the **rule of law**. The provisions of the Constitution are fundamental legal rules and binding for legislative, executive and judicial organs, as well as for administrative authorities and other institutions and individuals. With regard to these principles recourse to judicial review should be available against all actions and acts of the administration. Effective judicial control is a matter of supremacy of law, constitutional government, legality of administration and sound protection of the rights and freedoms of the people. Since the acts, actions and contracts of administrative authorities are exceptionally within the scope of ordinary courts, judicial control of the Administration is the function of administrative courts. These courts of special competence carry out their duties according to the principles of administrative law.

As recognised in doctrine, in order to accept an agreement as an administrative contract three criteria should be fulfilled: First, one of the contracting parties should be a public corporate body. Secondly, contracts which closely associate the private party in meeting the public need in question are regarded as administrative. Thirdly contracts should also contain «*clauses exorbitantes*» (clauses incompatible with the ordinary law which have the effect of causing the contract to be governed by administrative law) which involve an examination of the terms of the contract, and they should be different in nature from those which could be included in a similar contract under civil law.

In order to identify a public service, the quality of the contract must be examined. If the service is a public service, the question of whether or not it is operated by a private sector business cannot alter its public quality. For this reason, the Constitution stipulates that private enterprises performing public services may be nationalised when so required by the exigencies of the public interest.

In accordance with the Constitution, legislative organs cannot opt for review by ordinary courts of the acts, actions and contracts of administrative authorities. Administrative acts and actions fall within the scope of administrative law, and it follows that a regulation would be contrary to the guarantee of *due process*, whereby it follows that no one may be tried by any judicial authority other than the legally designated court.

The Constitution holds that the Council of State examines the contracts under which concessions are granted. In administrative law, a concession implies the performance of a public service by private law persons in accordance with a long term administrative contract.

Summary:

The case was filed by one-fifth of the total number of members of the Turkish Grand National Assembly. Article 5 of Law no. 3996 provides that a contract between the High Committee of Planning and a capital company or a foreign company does not constitute a concession. This contract is therefore subject to private law provisions.

The Constitutional Court held that provisions excluding administrative review of contracts having administrative quality and equating them with provisions of private law are contrary to the principles laid down in the Constitution. For this reason, the Constitutional Court found Article 5 of Law no. 3996 unconstitutional.

The decision was taken by a majority of members.

Languages:

Turkish.

ECJ-2003-3-023

28-11-2000 C-88/99 Roquette Frères SA v. Tax Office of Pas-de-Calais

a) European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 28-11-2000 / **e)** C-88/99 / **f)** Roquette Frères SA v. Tax Office of Pas-de-Calais / **g)** *European Court Reports*, I-10465 / **h)** CODICES (English, French)..

Keywords of the Systematic Thesaurus:

3.10 **General Principles** - Certainty of the law.
3.26 **General Principles** - Principles of Community law.
3.26.2 **General Principles** - Principles of Community law - Direct effect.
4.17.2 **Institutions** - European Union - Distribution of powers between Community and member states.

Keywords of the alphabetical index:

Effectiveness, community law, principle / Equivalence of community law, principle.

Headnotes:

In the absence of Community rules on reimbursement of national charges levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to determine the procedural conditions governing legal proceedings for safeguarding rights which individuals derive from the direct effect of Community law, it being understood that such rules cannot be less favourable than those governing similar actions of a domestic nature (principle of equivalence), and may not make it impossible or excessively difficult in practice to exercise rights which national courts have a duty to protect (principle of effectiveness).

First, as regards the principle of effectiveness, the establishment of reasonable limitation periods for bringing proceedings satisfies that requirement in principle inasmuch as it constitutes an application of the fundamental principle of legal certainty. Such limitation periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought. In that respect, a

national limitation period of up to a minimum of 4 years and a maximum of 5 years preceding the year of the judicial decision finding the rule of national law establishing the tax to be incompatible with a superior **rule of law** must be considered reasonable.

Secondly, observance of the principle of equivalence implies that the national procedure applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues. That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules of limitation to all actions for repayment of charges or dues levied in breach of Community law. Thus, Community law does not in principle preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.

It follows that Community law does not preclude legislation of a Member State laying down that, in tax matters, an action for recovery of a sum paid but not due based on a finding by a national or Community court that a national rule is not compatible with a superior rule of national law or with a Community **rule of law** may only relate to the period following 1 January of the fourth year preceding that of the judgment establishing such incompatibility (see paras 20-24, 29-30, 37 and operative part).

Summary:

The *Roquette Frères* judgment, delivered in response to a request for a preliminary ruling by the Béthune *Tribunal de grande instance*, was a further opportunity for the Court to reiterate the case-law it had established in its *Edis* judgment of 15 September 1998 (C-231/96, *European Court Reports,* I-4951) regarding the procedural autonomy of the member states and, in particular, the conditions of admissibility of national limitation periods for actions for recovery of sums paid but not due, brought by individuals in order to safeguard the rights they derived from the direct effect of Community law.

Following a merger operation in June 1987, Roquette Frères SA had paid the tax authorities registration duty on transfers of movable assets made in the context of that operation, as required under a provision of the General Tax Code. That provision was revoked as from 1 January 1994. In its judgment of 13 February 1996, *Bautiaa and Société française maritime* (C-197/94 and C-252/94, *European Court Reports,* I-505), the Court had ruled that Community law obliged the member states to exempt from all transfer duties capital increases implemented through one company's contributing all of its assets to another. In view of that decision, Roquette disputed its liability to pay the sum handed over in 1987 and applied to the tax authorities for a refund. On 3 April 1997 that application was rejected on the ground that, pursuant to the third paragraph of Article L. 190 of the Book of Tax Procedure, where a judgment had found a tax to be unlawful, claims for recovery of sums paid but not due could relate only to tax paid after 1 January of the fourth year preceding that of the judgment establishing unlawfulness. The matter was then brought before the Béthune *Tribunal de grande instance*, which decided to stay the proceedings and to request a preliminary ruling from the Court of Justice.

After having reformulated the question referred to it, so as to provide an answer of use in determining the case on the merits, the Court reiterated that, in the absence of Community rules concerning the refunding of domestic taxes which have been wrongly levied, it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing legal proceedings seeking to safeguard the rights which citizens derive from the direct effect of Community law, subject to observance of the principles of equivalence and effectiveness. At the same time, it noted that establishment of reasonable limitation periods for bringing proceedings constituted an application of the fundamental principle of legal certainty. Accordingly, a limitation period such as that applicable in the case before it could not be regarded as incompatible with the principle of effectiveness of Community law. Similarly, the principle of equivalence did not prevent the legislation of a member state from laying down, as in the case under consideration, alongside the limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which were less

favourable, governing claims and legal proceedings to challenge the imposition of taxes and other levies, provided those less favourable rules did not apply solely to actions based on Community law.

Lastly, the Court reiterated that the fact that it had given a preliminary ruling interpreting a provision of Community law, without limiting the temporal affects of its judgment, did not affect the right of a member state to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of sums levied in breach of that provision must be commenced.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

ECJ-2003-3-018 04-07-2000 C-352/98 P Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04-07-2000 / **e)** C-352/98 P / **f)** Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities / **g)** *European Court Reports*, I-5291 / **h)** CODICES (English, French)..

Keywords of the Systematic Thesaurus:

1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
1.4.6 **Constitutional Justice** - Procedure - Grounds.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Public health, cancerous substance, maximum concentration allowed / Liability, non contractual, Community, criteria / Damage, compensation, conditions.

Headnotes:

1. It follows from Article 168.A of the Treaty (now Article 225 EC), Article 51.1 of the Statute of the Court of Justice and Article 112.1.c of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, confines itself to reproducing the pleas in law and arguments previously submitted to the Court of First Instance. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (see paras 34-35).

2. The conditions under which the Community may incur non-contractual liability for damage caused by its institutions or by its servants in the performance of their duties cannot, in the absence of particular justification, differ from those governing the liability of the State for damage caused to individuals by a breach of Community law. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

Community law confers a right to reparation where three conditions are met: the **rule of law** infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach and the damage sustained by the injured parties.

As to the sufficiently serious breach of Community law, as regards both Community liability under Article 215 of the Treaty (now Article 288 EC) and Member State liability for breaches of Community law, the decisive test for finding that there has been such a breach is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. The general or individual nature of a measure taken by an institution is not, in that regard, a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question (see paras 41-44, 46).

Summary:

Laboratoires Pharmaceutiques Bergaderm SA, a company which had been placed in liquidation, and Mr J.-J. Goupil, its Chief Executive Officer, submitted an appeal under Article 49 of the Statute (EC) of the Court of Justice against the judgment of the Court of First Instance of 16 July 1998, Bergaderm and Goupil/Commission [T-199/96, *European Court Reports* p. II-2805] dismissing the company's claim for damages arising out of the preparation and adoption of the 18th Directive 95/34 adapting to technical progress specified appendices to Directive 76/768 on the approximation of the laws of the member States relating to cosmetic products.

The Bergaderm company specialises in the manufacture and marketing of sun creams and oils. Its flagship product, Bergasol, contains not only vegetable oil and filters but also bergamot essence. One of the molecules contained in this essence is potentially carcinogenic. After a long series of studies and consultations, and despite ongoing controversy in scientific circles, the Commission decided to set a maximum level on the concentration of this molecule in sun oils. Bergaderm considered that its liquidation had been due to this restriction on the use of the molecule, and so the company and its Chief Executive Officer lodged an appeal for compensation for the damage suffered. Having observed that as regards liability arising from legislative measures, the conduct with which the Community is charged must constitute a breach of a higher-ranking rule of law for the protection of individuals, the Court of First Instance held that in the instant case the Commission had violated none of the provisions governing the procedure for adopting the directive in question. Similarly, it ruled that the Commission had committed no manifest error of assessment, no breach of the principle of proportionality, and no misuse of powers. It therefore rejected the appeal in its entirety.

In support of their appeal the applicants rely on two main pleas. First of all they argue that the Court of First Instance committed an error of law by considering Directive 95/34 as a legislative measure. Secondly, they adduce that it committed a manifest error of assessment by holding that the Commission had properly appraised the available relevant scientific data. According to the applicants all the research carried out demonstrates Bergasol's safety and effectiveness, contrary to the Commission's assessment. The Commission replies that the applicants are merely reiterating the arguments already submitted to the Court of First Instance and that, for that reason, the appeal is inadmissible. In the alternative, the Commission contends that the criticised Directive is of general legislative scope and concerns the appellants as manufacturers of sun protection products, that is to say by reason of a business activity which may be pursued at any time by any person. It also points out that in so far as the appellants challenge the findings of fact of the Court of First Instance, their argument is manifestly inadmissible in the context of the appeal.

The Court did not uphold the objection of inadmissibility raised by the Commission. While agreeing that requests for mere re-examination of an application submitted to the Court of First Instance lay outside its jurisdiction, it pointed out that this did not apply to the present case. It therefore went on to consider the pleas put forward by the appellants. It mentioned the regulations on Community responsibility for damage caused to individuals, noting that the general or individual nature of a measure taken by an institution was not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question. Consequently, the first ground of appeal, which was based exclusively on the categorisation of the Directive in question as an individual measure, was dismissed. Going on to consider the second ground of appeal, the Court noted that the appellants had by no means demonstrated that the Court of First Instance had distorted the evidence submitted to it. It therefore dismissed the appeal.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

ECJ-2001-1-006 24-09-1998 C-319/96 Brinkmann Tabafabriken GmbH v. Skatteministeriet

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 24-09-1998 / **e)** C-319/96 / **f)** Brinkmann Tabafabriken GmbH v. Skatteministeriet / **g)** *European Court Reports* 1998, I-5255 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

3.12 **General Principles** - Clarity and precision of legal provisions.
3.26 **General Principles** - Principles of Community law.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Turnover taxes, tobacco / Obligation, breach, damage, direct link / Interpretation, erroneous, sufficiently serious.

Headnotes:

1. Articles 3.1 and 4.1 of Second Directive 79/32 EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, in the version in force in May 1990, are to be interpreted as meaning that rolls of tobacco wrapped in porous cellulose which have to be inserted into cigarette-paper tubes to be smoked must be deemed to be smoking tobacco within the meaning of Article 4.1 of that directive. Such rolls of tobacco, not being capable of being smoked as they are, do not correspond to the definition of a cigarette within the meaning of that directive.

2. Community law recognises a right to reparation for individuals who sustain damage as a result of a breach of Community law for which a member state can be held responsible where three conditions are met: the **rule of law** infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. Although failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law, it must be determined, where the national authorities gave immediate effect to the provisions of the directive, whether the authorities committed a sufficiently serious breach of those provisions, having regard to the degree of clarity and precision of those provisions (cf. points 24-25, 28, 30).

3. A member state whose authorities, in interpreting Articles 3.1 and 4.1 of Second Directive 79/32 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, erroneously classified a product such as rolls of tobacco wrapped in porous cellulose as a cigarette and did not suspend the operation of the decision adopted, is not bound by Community law to compensate the manufacturer for the damage sustained by the latter as a result of that erroneous decision.

Since the relevant provisions of the directive are open to a number of perfectly tenable interpretations, the national authorities did not commit a sufficiently serious breach of those provisions since the interpretation given to them was not manifestly contrary to the wording of the directive or in particular to the aim pursued by it (cf. points 31-33, § 2 of the ruling).

Summary:

The Danish court in question, which had asked the Court for a preliminary ruling under Article 177 EC, had to rule on an action for damages lodged by a tobacco manufacturer, Brinkmann, against the Danish tax authorities. The manufacturer was seeking compensation for alleged damage arising from the fact that, in breach of Second Council Directive 79/32/EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, one of its products, a roll of tobacco of industrial manufacture, intended for smoking after being inserted in a separately sold cigarette tube or rolled in ordinary cigarette paper, was classified in the cigarette category, which was taxed more heavily than smoking tobacco. After examining its characteristics, the Court concluded that from the standpoint of the directive the product in question concerned smoking tobacco and not cigarettes. With regard to the right to damages for infringement of Community law, the Court did not confine itself to referring to its previous case-law, such as the *Brasserie du Pêcheur and Factortame* Judgment of 5 March 1996 (C-46/93 and C-48/93, *Reports* p. I-1029). Although, in its own words, it was in principle the responsibility of national courts to determine whether the conditions for state liability arising from an infringement of Community law had been met, in this case it decided to apply the case-law itself, since it considered that it had all the necessary information to establish whether the facts of the case amounted to a sufficiently serious infringement of Community law and, if so, whether there was a causal link between the infringement of the state's obligation and the damage sustained. It concluded that the violation of Community law attributable to the Danish authorities did not entitle Brinkmann to damages.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.

ECJ-2001-1-003

17-07-1998 T-111/96 ITT Promedia NV v. Commission of the European Communities

a) European Union / **b)** Court of First Instance / **c)** / **d)** 17-07-1998 / **e)** T-111/96 / **f)** ITT Promedia NV v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-2941 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

3.20 **General Principles** - Reasonableness.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.18 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.
5.4.6 **Fundamental Rights** - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Dominant position, abuse / Decision, explanation / Constitutional tradition, common to member states / Right, abuse.

Headnotes:

1. The ability to assert one's rights through the courts and the judicial control which that entails constitutes the expression of the general principle of law which underlies the constitutional traditions common to the member states and which is also laid down in Articles 6 and 13 ECHR. As access to the courts is a fundamental right and a general principle ensuring the **rule of law**, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 EC.

Where the Commission has set out two cumulative criteria on the basis of which to identify cases in which legal proceedings are an abuse within the meaning of Article 86 EC - that they cannot reasonably be considered to be an attempt to assert the rights of the undertakings and can therefore only serve to harass the opposing party and that they were conceived in the framework of a plan whose goal was to eliminate competition - those two criteria must be interpreted and applied restrictively in a manner which does not frustrate the general rule of access to the courts. As regards the application of the first criterion, it is the situation existing when the action in question is brought which must be taken into account. Moreover, it is not a question of determining whether the rights which the undertaking concerned was asserting when it brought its action actually existed or whether that action was well founded, but rather of determining whether such an action was intended to assert what that undertaking could, at that moment, reasonably consider to be its rights.

2. The statement of reasons for a decision must be such as to enable the addressee to ascertain the matters justifying the measure adopted so that he can, if necessary, defend his rights and verify whether or not the decision is well founded and, second, to enable the Community judicature to exercise its power of review; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted. Since a decision constitutes a single whole, each of its parts must be read in the light of the others.

The Commission, in stating the reasons for the decision which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

Summary:

In a 1969 agreement the Belgian telephone company Régie des Télégraphes et Téléphones (RTT) granted an exclusive right to publish Belgium's telephone directories to ITT Promedia.

In 1994, unable to agree with ITT Promedia on terms for continuing the co-operation initiated in 1969, RTT's successor Belgacom terminated the agreement. This termination of contract gave rise to extensive litigation in the Belgian courts, each company filing various complaints against the other, which in turn led to counter-claims.

Meanwhile, ITT Promedia brought proceedings against Belgacom before the Commission, accusing it of abusing its dominant position within the meaning of Article 86 EC.

The Commission admitted certain aspects of the application but rejected others. The applicant lodged an appeal against this decision with the Court of First Instance.

Its main grievance was against the Commission's decision that, in taking legal action to have what it considered as its rights acknowledged and ITT Promedia punished for infringing them, Belgacom was not abusing its dominant position.

While agreeing, like the Commission before it, that legal action taken by a firm in a dominant position against its competitors could indeed constitute abuse of power in certain circumstances, the Court found that in this instance there were no such circumstances and that the Commission had adequately explained its decision to that effect and could therefore not be accused of violating its obligation to explain its decisions under Article 190 EC.

It therefore dismissed the application.

Languages:

English, French.

ECJ-2000-3-002

29-01-1998 T-113/96 Edouard Dubois et fils v. Council of the European Union and Commission of the European Communities

a) European Union / **b)** Court of First Instance / **c)** / **d)** 29-01-1998 / **e)** T-113/96 / **f)** Edouard Dubois et fils v. Council of the European Union and Commission of the European Communities / **g)** *European Court Reports* 1998, II-125 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

1.4.5.3 **Constitutional Justice** - Procedure - Originating document - Formal requirements.
2.1.1.3 **Sources of Constitutional Law** - Categories - Written rules - Community law.
2.2.3 **Sources of Constitutional Law** - Hierarchy - Hierarchy between sources of Community law.
3.11 **General Principles** - Vested and/or acquired rights.
3.19 **General Principles** - Margin of appreciation.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.
5.4.4 **Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

Single European Act / Customs, intra-Community / Customs agent, profession, demise, compensation.

Headnotes:

1. Under Article 19.1 of the Statute of the Court of Justice, and under Article 44.1.c of the Rules of Procedure of the Court of First Instance, all applications are to indicate the subject-matter of the dispute and contain a brief statement of the grounds on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself.

In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage.

2. A claim is inadmissible where it seeks to impute liability to the Community for damage whose source is to be found in the Single European Act, which is an instrument of primary Community law and is thus neither an act of the Community institutions nor an act of the servants of the Community in the performance of their duties and cannot, therefore, give rise to non-contractual liability on the part of the Community.

Moreover, under the hierarchy of rules, the provisions of Article 178 and Article 215.2 EC, which govern the non-contractual liability of the Community and are primary law, cannot be brought to bear on instruments belonging to an equivalent level, such as the provisions of the Single European Act, where this is not expressly provided for.

3. Omissions by the Community institutions give rise to the non-contractual liability of the Community only where the institutions have infringed a legal obligation to act under a provision of Community law.

In the case of the demise of the profession of intra-Community customs agent as a result of the Single European Act, there is no obligation under the Single European Act itself or under any other formal rule of written Community law, nor under any general principle of law, by virtue of which the Community would be obliged to compensate a person who has been subject to a measure expropriating his property or restricting his freedom to enjoy his right to property since the Community cannot be obliged to make good damage caused by acts which cannot be imputed to it. Consequently the Community is not obliged to compensate the members of this profession.

However, the possibility cannot be excluded that an obligation to provide compensation might, in appropriate circumstances, arise under the domestic law of the member state on whose territory the intra-Community customs agent carried out his activities.

4. The non-contractual liability of the Community for damage caused, either by legislative acts adopted by its institutions, or by unlawful failure to adopt such acts, can be incurred only if there has been a breach of a higher-ranking **rule of law** for the protection of individuals. Moreover, if the institution has adopted or failed to adopt a legislative act in the exercise of a broad discretion, the Community cannot be rendered liable unless the breach is clear, that is to say, of a manifest and serious nature.

Any insufficiency of the Community's action to assist the profession of customs agents when the single market was established, if the institutions are in breach of an obligation to act, is not such as to give rise to the liability of the Community by reason of the violation of the principle of vested rights, since the institutions have, when adopting acts of a legislative nature which concern economic policy decisions, a broad discretion in deciding what action to take.

In that connection, Regulation no. 3632/85 defining the conditions under which a person may be permitted to make a customs declaration, which does not define or clarify, in Community law, the pursuit of the profession of customs agent, and is confined to harmonising the conditions under which a person is entitled to make a customs declaration, did not therefore create for customs agents a clear advantage which could be defined as a vested right. Furthermore, even if Regulation no. 3632/85 did in practice grant a specific advantage to the professional category of customs agents, the members of that profession are still not justified in claiming a vested right in the maintenance of that advantage, since the Community institutions are entitled to adapt rules and regulations to the necessary developments which they must undergo and, therefore, traders cannot claim a vested right in the maintenance of an advantage which they obtained from the rules in issue and which they enjoyed at a given time.

5. The right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. On the other hand, a person may not plead a breach of that principle unless the administration has given him precise assurances.

6. The freedom to pursue a trade or profession forms part of the general principles of Community law, the observance of which the Community judicature ensures. However, that principle does not constitute an unfettered prerogative, but must be viewed in the light of its social function. Consequently, the freedom to pursue a trade or profession may be restricted, provided that those restrictions correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which would affect the very substance of the right so guaranteed.

In the light of the essential aim pursued, the completion of the internal market, which is an objective of evident general interest, does not entail any undue limitation on the exercise of the fundamental right in question.

Summary:

The Single European Act, which came into force on 1 July 1987, amended the EEC Treaty to make way for an internal market, comprising a space with no internal borders, where goods, people, services and capital could circulate freely. This led, starting on 1 January 1993, to the disappearance of border controls on goods circulating between member states.

As a result, there was no longer any need for the customs agents and professionals who used to earn their living helping others to cope with the customs and fiscal formalities necessary when goods were shipped across borders. Various support measures were taken by the Community to cushion the socio-economic effects of the single market on these professions, for example by helping the firms concerned and their employees to develop new activities and skills.

The French firm of customs agents *Dubois et fils*, considering that these measures failed to offset the damage done to it by the elimination of customs formalities at the Community's internal borders, brought proceedings for damages against the Council and the Commission, which it considered responsible, before the Court of First Instance.

After dismissing a plea of inadmissibility based on the alleged lack of clarity of the application, the Court examined the merits of the case successively for liability without fault, and for fault liability. It dismissed liability without fault, noting that under no circumstances could the Single European Act, an instrument of primary law, render the Community liable as it was neither an act of the Community institutions nor an act of the servants of the Community in the performance of their duties. On the question of fault liability, the Court, having recalled the circumstances on which such liability is conditional, noted that the defendants had done nothing illegal that could be considered to render the Community liable.

It is not possible to hold that, because they did not do more for the professions affected by the elimination of border controls, the institutions violated any rule protecting private individuals. The introduction of the single market, a fundamental objective of the Communities, did not result in any violation of established rights, of the principle of protection of people's legitimate expectations, or of their freedom to carry on professional activities. Even if any compensation were due, perhaps responsibility for it should lie with the member states, the authors of the Single European Act. Accordingly, the application was dismissed.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.